Supreme Court, U.S.
FILED

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OFFICE OF

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, _____

JOHN V. KLIEBERT

Petitioner,

v.

GENERAL ELECTRIC COMPANY, INCORPORATED.
KIDDER PEABODY GROUP, INCORPORATED,
KIDDER PEABODY & COMPANY, INCORPORATED,
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Respondents.

PERMISSION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT

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356 PP

QUESTIONS PRESENTED

1. Did the trial court's decisions, orders and judgments dated June 10, 1999 (A. 5a), August 12, 1998 (A. 6a-7a), August 6, 1998 (A. 8a) and June 3, 1998 (A. 9a-10a), subsequent to August 8, 1998 violate Petitioner's rights under federal constitutional law and guarantees, including the guarantees of due process and fair and equal treatment before the law.

2. Did the IAS court in its decisions, orders and judgments dated October 22, 1997 (A. 14a-16a) [see also proposed order [A. 17a-21a]), September 16, 1997 (A. 22a-24a), July 14, 1997 (A. 25a-26a) violate Petitioner's rights under federal constitutional law and guarantees, including the guarantees of due process and fair and equal treatment before the law.

3. Did the appellate courts in their decisions dated June 29, 2000 (A. 1a-2a), April 6, 2000 (A. 3a), January 18, 2000 (A. 4a), September 9, 2000 (A. 11a), June 3, 1999 (A. 12a), October 27, 1998 (A. 13a) violate Petitioner's rights under federal constitutional law and guarantees, including the guarantees of due process and fair and equal treatment before the law.

3. Did Petitioner's Complaint (A. 40a-85a) state causes of action?

4. Were alleged facial deficiencies in Petitioner's causes of action in the instant complaint capable of correction by discovery and amendment?

5. Can facts unknown to Respondents be the basis of "probable cause"?

6. Which, if any, of the facts underlying the causes of action in the instant complaint were determined against Petitioner prior to this action?

7. Can a private citizen or private corporation escape punishment if they interpose state actors between themselves and their victims to carry out violations of constitutional law, statutory law and common law?

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Petitioner John V. Kliebert, Pro Se, respectfully prays that a writ of certiorari issue to review the decisions, orders and judgments of the New York Supreme Court Appellate Division First Department No. 3101-3104N (NY January 18, 2000); the New York Supreme Court, IAS Part 6, decisions underlying this judgment (NY June 3, 1998, August 6, 1998, August 11, 1998 and June 10, 1999 and the superior decisions by the New York Court of Appeals (NY June 29, 2000, decision and order, respectively). This petition for review of the above carries with it a petition to review the jurisdictional basis of said items as found in the decisions, orders and judgments of the New York Supreme Court Appellate Division First Department No.2440 (NY October 27, 1998); the New York Supreme Court, IAS Part 6, decisions underlying this judgment (NY July 14, 1997, September 16, 1997, October 1, 1997 and October 22, 1997); and the superior decisions by the New York Court of Appeals (NY June 3, 1999 and September 9, 1997).

OPINIONS BELOW

The decisions, orders and judgments of the New York courts are reported in the Appendix ("A.") as follows:

-New York Court of Appeals decision and order denying, *inter alia*, leave to appeal and permission to expand record at A. 1a-2a;

-New York Supreme Court Appellate Division First Department order denying, *inter alia*, reargument of, or in the alternative, leave to appeal to the Court of Appeals at A. 3a;

-New York Supreme Court Appellate Division First Department decision and order affirming the lower court judgment and dismissing other appeals at A. 4a;

-New York Supreme Court IAS Part 52 decisions and orders denying reargument at A. 5a;

-New York Supreme Court IAS Part 52 orders denying, *inter alia*, vacatur and reargument of its June 3, 1998 orders and judgments at A. 6a-10a;

Decisions and Orders Under Review and Forming the Jurisdictional Basis For the Above Orders, Decisions and Judgments:

-New York Court of Appeals decisions and orders at A. 11a-12a;

-New York Supreme Court Appellate Division First Department affirming the lower court decision at A. 13a;

-New York Supreme Court, IAS Part 6, decisions awarding, *inter alia*, attorneys' fees and injunction A. 14a-26a.

JURISDICTION

The decision of the New York Supreme Court Appellate Division First Department was issued on January 18, 2000, No.3101-3104N affirming the decisions of the New York Supreme Court, IAS Part 52. Review was denied by the New York Court of Appeals on June 29, 2000, No.612.

As to the underlying jurisdictional decisions, orders and judgments under appeal, the decision of the New York Supreme Court Appellate Division First Department was issued on October 27, 1998, No.2440 affirming the decisions of the New York Supreme Court, IAS Part 6. Review was denied by the New York Court of Appeals on June 3, 1999, No.387. Petitioner's timely application for reargument was denied by the same court on September 9, 1999.

The Jurisdiction of this Court is invoked under 28 U.S.C. Ch. 1257, as revised in the Act of June 27, 1988, 102

Stat. 662, Petitioner having asserted below and intending to assert here deprivation of rights secured by the Constitution of the United States.

Petitioner also relies upon precedent for review of the deprivation of rights secured by the Constitution of the United States and claimed by Petitioner as set in Chambers v. Mississippi, 410 US 284, 290 n.3 (1973), Street v. New York, 394 US 581-85 (1969) and New York ex rel. Bryant v. Zimmerman, 278 US 67 (1928) (the state court's refusal or failure to articulate its denial of a federal claim is just as reviewable as an express decision on the point).

Further authority may be found in Rogers v Alabama, 192 US 226, 230-31 (1904) (federal question raised if sufficient evidence that the federal question was necessarily decided by the state court; federal review appropriate where court's refusal is an evasion of the court's jurisdiction).

CONSTITUTIONAL PROVISIONS RAISED

The provisions underlying Petitioner's arguments for deprivation of rights secured by the Constitution of the United States are as follows:

One, for deprivations associated with the 1998 proceedings to determine the exact dollar amount of the 1997 award of attorneys' fees against a pro se litigant: Article V (Trials for Crime-Just Compensation for Private Property Taken for Public Use) and Article XIV (Citizenship denied-Privileges of Citizens).

And two, for deprivations associated with the 1997 award of attorneys' fees and all other claims: Articles V and XIV cited above as well as Article IV (Persons and Houses to be Secure from Unreasonable Searches and Seizures), VI (Civil

rights in Trials for Crimes Enumerated), VII (Preservation of Right of Trial by Jury), and IX (Reserved Rights of People).

The full text of the applicable Amendments cited above can be found at pages 121a through 124a of the Appendix.

Petitioner raised the constitutional provisions cited below in his summons and complaint (A. 40a-85a), in his papers before the ruling state courts including but not limited to Petitioners' Affidavit In Support Of Motion For Permission To Appeal To The Court of Appeals As Of Right, Or, In The Alternative, Permission To Appeal; And Permission To Expand Record On Appeal (A. 86a-312a).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Respondents General Electric Company, Incorporated, Kidder Peabody Group, Incorporated, Kidder Peabody & Company, Incorporated, Edward A. Cerullo, Richard LaFergola, and Joel "JJ" McKoan are referred to herein as "General Electric", "Kidder Group", "Kidder", "Cerullo", "LaFergola", and "McKoan". The instant case is referenced herein as "General Electric" and the proceedings had in General Electric under appellate index no. 3734/97 are referred to as the "prior appeal" and "proceedings under prior appeal". The proceedings under Kliebert vs. McKoan, et al., 643 N.Y.S.2d 114 (1st Dep't), lv. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996) as "McKoan".

Under appeal and review here are (1) the trial which was had to determine the amount of attorneys' fees, the decision of the trial court setting the amount of the award at $60,000, the award of attorneys' fees and injunction by the IAS court (*See* Argument Point I), and (2) the denials of substantial and procedural due process and fair and equal treatment before the law (5th & 14th Amendments) in the court decisions had

heretofore in General Electric and in McKoan (*See* Argument Point II).

In 1994 Petitioner brought an action (McKoan) against all the Respondents except Cerullo. In McKoan, the courts found that Petitioner had attempted to plead 2 causes of action under tort law: malicious prosecution and emotional distress (A. 22a-24a, 13a [R.668; R.677] ["R." refers to the pages in the record below]). The courts found that Petitioner had plead conclusory allegations and bare legal conclusions and not facts to support the 2 claims (A. 22a-24a, 13a [R.668; R.677]). The IAS court (Wilk, Elliott J.) dismissed the McKoan action for failure to state causes of action under tort law for malicious prosecution and intentional infliction of emotional distress finding that Petitioner had plead "conclusory and unsubstantiated allegations" and not facts to support his 2 claims (A. 22a-24-a, 13a). The IAS court also denied Petitioner permission to serve a second amended complaint since it found that Petitioner there, too, had failed to plead facts but had only plead conclusions.

The McKoan decision was affirmed by the appellate court (A. 13a [R.677]). The appellate court found as did the IAS court below that Appellant had (1) plead only causes of action of malicious prosecution and emotional distress under tort law and (2) that Petitioner had plead "bare legal conclusions" and not facts necessary to support his 2 claims (A. 13a [R.677]). The appellate court denied Petitioner permission for reargument and leave to appeal to the Court of Appeals (R.680). The Court of Appeals denied Petitioner leave to appeal (A. 11a-12a [R.680.1]). The United States Supreme Court refused to docket Petitioner's petition for writ of certiorari because it was jurisdictionally out of time by 1 day (R.681).

Petitioner brought the action in General Electric by the filing of the Complaint dated December 12, 1996 (A. 40a-85a

[R.615-667) basing his decision to file on the explicit rulings of the IAS court and the appellate court in McKoan: bare legal conclusions and conclusory and unsubstantiated allegations and not facts were plead in McKoan. General Electric alleges 19 explicit causes of action not contained in McKoan: prima facie tort (1st through 6th causes of action); conversion and breach of fiduciary duty and contract (8th, 9th, 10th and 11th causes of action), violation of constitutional guarantees (7th, 12th through 19th causes of action exclusive of the 16th), civil rights violations under 42 U.S.C. Chapters 1983 and 1985 (12th through 19th causes of action exclusive of the 18th) and implicit causes of action for assault and negligence. General Electric is based on (1) legislated law (2) on facts and causes of action not contained in the McKoan complaint (the courts having ruled in McKoan -- and Respondents having argued in McKoan -- that Petitioner had only plead 2 causes of action under tort law for malicious prosecution and emotional distress in McKoan and that Petitioner did not plead facts in McKoan to support his causes of action but, rather, had merely plead conclusions to support his 2 causes of action) and (3) on facts and issues left undetermined in McKoan

Respondents filed 2 motions in response to Petitioner's Complaint. The first was for dismissal of the action against Respondent LaFergola ("LaFergola Motion") for failure to make legally binding service (R.902). The second ("April Motion"), on behalf of all Respondents, was to dismiss the Complaint for failure to state causes of action and as being barred by rules established by the courts (R.540). Included in the April Motion was a demand for attorneys' fees and injunction. The IAS court granted both motions on alleged defaults (A. 17a-21a [R.24; R.877]) and denied Petitioner's motion to vacate the alleged default (R.17-19). The appellate court affirmed the lower court decision and denied Petitioner's motion for reargument and for permission to appeal to the Court of Appeals. The Court of Appeals denied Petitioner's application because of error by Petitioner stating in its decision

that the motion (application): "is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution".

The Complaint in General Electric (A. 40a-85a [R.615-677]) states causes of action and dismissal pursuant to CPLR 3211(a) (7) and CPLR 3211 (a) (5) is contrary to the law and a denial of Petitioner's rights to due process and to fair and equal treatment before the law (*See* Argument Point II). Petitioner's Complaint is permitted under (1) CPLR 205(a) which permits Petitioner to bring General Electric even in the event that the same facts and causes of action appear in both complaints (*See* Argument Point II), (2) the explicit rulings by the courts in McKoan which found (a) Petitioner to have plead conclusions and not facts to support his cause of action in McKoan and (b) that a dismissal for facial insufficiency is not a decision on the merits, and (3) the instant complaint is based on facts and issues either not raised or left undetermined in McKoan. Respondents cite CPLR 3211 (a) (5) (res judicata, collateral estoppel) as law in conflict with CPLR 205 (a). The explicit conflicts between the legislated laws cited are unresolved by any decision of the Court of Appeals.

The General Electric action is brought in good faith and, among other things, based on the law contained in CPLR 205(a) and the explicit ruling of the courts in McKoan. The award of attorneys' fees against the Petitioner - as demanded by Respondents and granted by the IAS on default and without comment in its 1997 decisions - is contrary to the strict and explicit requirements of the 1997 revision of 22 N.Y.C.R.R. Chap. 130-1.2 (*See* Argument Point I). The awarding of attorneys' fees and the issuance of an order enjoining Petitioner from further litigation against Respondents or in connection with the facts underlying this action without the ability to bring such an action represented by counsel or with court permission - on default and without comment - is contrary to law and unprecedented (*See* Argument Point I).

Service on Respondent LaFergola and the filing of opposition papers on the April Motion were made according to law. The failures of the courts below to uphold service and filing are contrary to law (*See* Argument Point II).

The award of attorneys' fees, the trial had to determine the amount of said award, the setting of the amount at $60,000 and the terms of injunction are all prohibited under law (*See* Argument Point I).

A detailed statement of the facts and procedural history can be found in the appendix in Petitioner's papers before the New York Court of Appeals (A. 126a-145a).

REASONS FOR GRANTING THE WRIT AND PLEAS TO THE COURT

Under rule 15.6 of the Rules, the Clerk may distribute and this Court may consider the petition and brief in opposition before receipt of the petitioner's reply brief if such brief is received 11 days or more from the date the brief in opposition is filed.

This Petitioner respectfully requests that the Court exercise its discretion and withhold consideration until after the filing of the reply brief. Petitioner is not an attorney and has no legal training. While these are not Petitioner's only handicaps, they serve to severely impede if not cripple his ability to draft necessary papers or to proceed in the same manner that an attorney at bar or a large law firm would proceed. It is necessary for the Court to read all Petitioner's arguments Petitioner is to get a full and fair hearing.

Petitioner begs the Court to look beyond the limits of his draftsmanship and to grant Petitioner all the necessary liberties normally extended by the Court to the self-represented.

Argument Point I.
ATTORNEYS' FEES AND INJUNCTION
Petitioner Was Denied His Constitutional Rights To Fair And Equal Treatment Before The Law And To Substantial and Procedural Due Process

A. Proceedings To Determine The Exact Dollar Amount Of The Award Of Attorneys' Fees And The Award Itself Were Unlawful

1. The Trial Court Had No Jurisdiction Over Petitioner:

a. The Order Of The IAS Court Was Legally Insufficient For The Purposes of Investing Jurisdiction To The Trial Court And Legally Insufficient For The Making Of Such An Award

Petitioner argued in the courts below that Respondents were awarded their attorneys' fees in the default orders issued by the IAS court July 14, 1997 (A. 25a-26a) and the order of the IAS court on September 16, 1997 (A. 22a-24a). Respondents argued in the courts below and stated during the proceedings at trial that the award of attorneys' fees was made by the October 22, 1997[1] of the IAS Court (A. 14a-16a). In either case 1997 law and not 1998 law is applicable. Respondents misled the courts in the proceedings below by citing the 1998 revision of 22 N.Y.C.R.R. 130-1.2 as controlling law on the 1997 decisions. This is a patently false

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[1]See statement to the trial court by Respondents' attorney Michael E. Gerber explaining reason for the matter before the trial court: "For a determination of the amount of attorneys' of attorneys' fees, attorneys' fee having been awarded to the defendants by Justice Wilk by an order of October 22, 1997."

assertion by Respondents. The 1997 decisions are subject to 1997 law. The 1997 revision of 22 N.Y.C.R.R. 130-1.2 reads:

> "The court may make an award of costs or impose sanctions or both upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate . . . . . In no event shall the total costs awarded and sanctions imposed exceed $10,000 in any action or proceeding."

The 1997 orders, decisions or judgments referenced above (A. 25a-26a, 17a-21a, 14a-16a) are legally insufficient for an award of attorneys' fee and legally insufficient as the basis for the proceedings to determine the exact dollar amount of such an award.

Not one of the 1997 orders, decisions or judgments referenced above satisfies the strict and explicit legal requirements necessary under the 1997 revision of 22 N.Y.C.R.R. 130-1.2 for the award of attorneys' fees ("costs") or as necessary to for the basis for proceedings to determine the amount of such an award. The IAS court rulings referred to above fail to satisfy any of these strict legal requirements. The award of attorneys' fees -- and the proceedings to determine the exact dollar amount of the award -- based on said 1997 rulings violates law and denies Petitioner his rights to (1) substantial and procedural due process and (2) fair and equal treatment before the law. Under the 1997 revision of 22 N.Y.C.R.R. Chapter 130-1.2 -- the only law under which the IAS court could make an award of attorneys' fees, the IAS court must satisfy 4 conditions and limit its award to a $10,000 maximum: (1) the court must in a written decision specifically and explicitly label as "frivolous" conduct by the Petitioner, (2) the court must in said written decision specifically and explicitly state the exact conduct the court labeled as "frivolous", (3) the

court must in said written decision specifically and explicitly state the reasons why, under the specific circumstances of the instant case, the court found the specific conduct labeled and complained of as "frivolous" to be such, and (4) the court must state in said written decision specifically and explicitly the reasons why the court found the amount awarded to be appropriate; further, in no event can the amount awarded for attorneys' fees exceed $10,000 in any action or proceeding. All these conditions are absent from the 1997 rulings of the IAS court. The IAS court never labeled Petitioner's conduct as "frivolous" in any written decision, never set forth in a written decision reasons why, under the specific circumstances of the instant case, the court found the specific conduct labeled and complained of as "frivolous" to be such (and no conduct by Petitioner was labeled or complained of as "frivolous" by the IAS court) and the IAS court never set forth in a written decision reasons why the amount awarded (attorneys' fees not to be in excess of $10,000 under law) to be appropriate, in fact, there is no discussion whatsoever by the IAS court about such an award or the propriety of such an award just as there is no labeling of any conduct by Petitioner as "frivolous", nor any specification of "frivolous" conduct nor any reasons given why, under the circumstances of the instant case, such unlabeled and unspecified conduct is deemed frivolous. The only "claims" of "frivolous" conduct were made by the Respondents, and never by the IAS court.

Further, while Respondents' alleged Petitioner's Complaint to be "frivolous" before the IAS court they did an about turn at the trial had to determine the exact dollar amount of the award. At trial, Respondents reversed their claim that Petitioner's Complaint was frivolous and argued to the trial court that the Complaint presented novel questions and substantial questions of law and that said substantial and novel questions were of such magnitude that said attorneys required weeks of dedicated legal expertise and research (purportedly valued at $76,863.31) in order to defeat Petitioner's claims.

b. No Judgment In Evidence As Required Under 22 N.Y.C.R.R. 130-1.2

The law on award of attorneys' fees -- and the proceedings to determine the exact amount of the award -- requires that the award (made October 22, 1997 according to Respondents) "be entered as a judgment of the court" (22 N.Y.C.R.R. 130-1.2, 1997 and 1998 revisions). No such judgment or entry of such judgment is in evidence at the trial. The absence of such judgment requires the Court to vacate the June 3, 1998 Judgment.

2. Setting The Exact Dollar Amount Of Award of Attorneys' Fees In Excess Of 1997 $10,000 Limit Unlawful

Assuming, arguendo, the IAS court order was either appropriate under the circumstances of the instant case (which it was not) or legally sufficient (which it was not) to either (1) to give jurisdiction to the trial court or to any court to set the exact dollar amount of the award or (2) to make an award Respondents attorneys' fees, the maximum legal amount of the award would be limited to $10,000: "In no event shall the total costs awarded and sanctions imposed exceed $10,000 in any action or proceeding." (*See* 1997 revision of 22 N.Y.C.R.R. 130-1.2 as quoted in the previous section). The IAS court made the award of attorneys' fees in 1997. Respondents have admitted that the attorneys' fee award was made by the IAS court in 1997 and not by the trial court in 1998. The trial court (Hon. Robert D. Lippmann) stated in the records of the proceedings that it (the trial court, Hon. Robert D. Lippmann) did not make the award of attorneys' fees but that the award of attorneys' fees was made by the IAS court in 1997. The law in effect at the time the award was made limited the award to a maximum of $10,000. Any amount in excess of $10,000 is a violation of the law in effect at the time the award was made. The $60,000 award of Respondents attorneys' fees is unlawful.

The setting the amount of said award at $60,000 denied Petitioner his federal constitutional rights to (1) fair and equal treatment before the law (14th Amendment) and (2) his right to substantial and procedural due process (14th and 5th Amendments), among other rights and legal protections.

3. Reversal Warranted As A Full And Fair Hearing At Trial Was Denied Petitioner As a Result Of Perjury And Other Misconduct By Respondents: Assertions Of Material Factual Statements That Are False; Conduct Involving Dishonesty, Fraud, Deceit And Misrepresentation; And Conduct Prejudicial To The Administration Of Justice

a. Fees Associated With Respondents' Res Judicata Motion Were Procured By Perjured Testimony

The fees claimed in association with the Respondents' *res judicata* motion (April Motion) were procured on the basis of material factual statements that were false. In the proceedings before the trial court -- and in rebuttal to Petitioner's counsel's attempts to establish Respondents' attorneys' work in General Electric was duplicative of the same work already done by the same law firm in McKoan, Joel M. Miller ("Miller"), attorney and senior partner with Miller & Wrubel P.C., (the law firm representing Respondents) and Michael E. Gerber ("Gerber"), an attorney and an associate with Miller & Wrubel testified that the General Electric Complaint was based on new and numerous causes of action not contained in the McKoan. Attorneys Miller and Gerber argued and testified under oath that no reduction in the amount of attorneys' fees was justified based on Appellants' counsel's claims that much of the work in both cases was essentially the same. The trial court was swayed by Respondents' trial statements, accepting attorneys Miller's and Gerber's sworn

testimony that 15, 16 or 17 new causes of action were plead in General Electric, that said 15, 16 or 17 new causes of action were so novel and substantial that they required weeks of dedicated legal expertise and research by Respondents' attorneys (purportedly valued at $76,863.31) and allowing for no reduction in the amount of attorneys' fees demanded by Respondents based on the duplication of work in the two cases. See A. 165a-167a for testimony.

This testimony by Respondents' attorneys impeaches the sworn testimony of attorney Michael E. Gerber and central basis put forth by Respondents in the proceedings before the courts below: that the causes of action (and facts) in both actions are identical or essentially identical. In sworn testimony and court papers signed by attorneys Miller and Gerber, Respondents state that the causes of action claimed in McKoan (1994) are "substantially the same as" those in General Electric (1996); that General Electric (1996) alleges "the very [same] claims, on the basis of the same facts . . . [as alleged] in the 1994 [McKoan] Action"; and that General Electric (1996) is "based on the same underlying facts, and raising essentially identical claims . . . [as] in the 1994 [McKoan] Action" (emphasis added) (*See* 4/18/97 Sworn affidavit of attorney Michael E. Gerber at R.543 par. 5, R.547 par. 10 and R.545 par. 7, respectively). The same statements are repeated over and over in all papers put before the courts below by Respondents. Citing, for example, from Respondents' Memorandum of Law in Support of Defendants' Motion to Dismiss and for Sanctions Against Plaintiff (Trial Exhibit 8, p. 485 of the lower court record). See A. 168a-170a for testimony.

Thus, Respondents by their attorneys Miller and Gerber stated that each and every claim in 1996 General Electric Complaint (other than the 9th & 10th [breach of fiduciary, and breach of fiduciary and implied contract, respectively], and the implicit causes of action for assault and negligence]) was plead in the 1994 McKoan action and the each and every cause of

action in the 1996 General Electric Complaint was the same or the essentially identical cause of action plead in the 1994 McKoan action (other than the 9th & 10th; and the implicit causes of action for assault and negligence). Respondents make no mention of the implicit causes of action for assault and negligence in the underlying proceedings.

Respondents sworn statements constitute fraud, misrepresentation and misconduct under CPLR 5015 (a) (3) and under Part 1200 Disciplinary Rules of the Code of Professional Responsibility and provided the trial court and the appellate court with the basis for the providing Petitioner with all or part of the relief he requested, and in particular Petitioner's requests that the trial court vacate the decision, order and judgment setting the amount of the award of attorneys' fees at $60,000 and that the appellate court vacate its initial decision affirming the award. See, eg., Oppenheimer v. Westcott, 47 N.Y.2d 595, 604, 419 N.Y.S.2D 908, 912 (1979) (vacating judgment on grounds of misconduct by plaintiff in failing to reveal material facts; Prote Contracting Co. v. Board of Educ., 230 A.D.2d 32, 39-40, 657 N.Y.S.2d 158, 162-63 (1st Dep't 1997) (vacating judgment on ground that witness had been bribed).

CPLR 5015 is entitled "Relief from judgment or order." Section 5015 (a) (3) reads:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: .... ;
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party;

Part 1200 Disciplinary Rules of the Code of Professional Responsibility states under Chapter 1200.3:

Chapter 1200.3 Misconduct.

(a) A Lawyer shall not:

(1) Violate a disciplinary rule.

(2) Circumvent disciplinary rules through the actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. [emphasis added]

(5) Engage in conduct that is prejudicial to the administration of justice [emphasis added].

(6) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

and under Chapter 1200.1 (i):

Chapter 1200.1. Definitions

(i) *Fraud* does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another [emphasis added].

The provisions of CPLR 5015 (a) (3) and of Part 1200 Disciplinary Rules of the Code of Professional Responsibility provided the basis for vacating June 3, 1998 decision of the trial court and the January 18, 2000 decision of the appellate court.

Respondents' misconduct here is sanctionable under provisions of 22 N.Y.C.R.R. Chapter 130-1.1 (c) revised 1998 defining sanctionable conduct as:

(c) For Purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law [fact] and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [or]

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another[.]; *or*

(3) it asserts material factual statements that are false[2]. [emphasis added]

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken is frivolous, the court shall consider among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, [or] should have been apparent [to counsel], *or was brought to the attention of counsel or the party. (Subsection (c) chgd by AO 783/97, eff. 3/1/98. Matter in brackets eff. only until 3/1/98. Matter in italics eff. 3/1/98.)*

Respondents have been confronted with these claims of misconduct by Petitioner in the proceedings in the courts below. Respondents, however, have never denied that the decisions, orders and judgments granted in Respondents favor were procured on the basis of the lies Respondents' attorneys told while under oath. Respondents only reply to these charges has been has been an attempt to obscure their misconduct by mislabeling sworn testimony as "litigation positions". Respondents' indignant and embarrassed pleas notwithstanding, Petitioner's claims here and in the proceedings heretofore are not that Respondents' "litigation positions" (legal arguments)

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[2]Portions in italics appear so in the original.

are "inconsistent" (inconsistent?) with "the [sworn] testimony of their attorneys at the Hearing" nor does Petitioner claim that Respondents' "claimed inconsistency [emphasis added] did not result in the Attorneys' Fees" award, but that Respondents' attorneys lied while under oath and obstructed justice. Let me repeat that: Petitioner's claim is that Respondents' attorneys perjured themselves by lying while under oath and that Respondents' attorneys withheld from the courts evidence in their possession which was material and necessary and that the decisions, orders and judgments granted in Respondents' favor were procured on the basis of the lies Respondents' attorneys told while under oath and by Respondents' willful, wanton and calculated withholding of material and necessary evidence.

b. Fees Subsequent To The July 10, 1997 Motion Call Were Procured By Respondents' Calculated Efforts To Obstruct Justice

It was improper for the trial court to include in the amount awarded Respondents the legal work claimed on Respondents' Client Statement Report (R.1273) on and after July 10, 1997 which resulted solely from Respondents' efforts to burden Petitioner and to obstruct justice. Respondents withheld from the courts (the IAS court, the trial court, the First Department and the Court of Appeals) their knowledge that there was no default on the *res judicata* motion (April Motion). Respondents knew that Petitioner had indeed filed his opposition papers. Respondents knew that Petitioner's process server had answered the call on July 10, 1997 and presented Petitioner's opposition papers to the court. Answering the call for Respondents was Corinne J. Parker[3], an employee of Miller & Wrubel who in response to the motion call filed Respondents' motions for dismissal and filed Respondents' reply papers to

[3]Ms. Parker appears as "CJP" on entries on the "record"(s) attached to the invoices.

Petitioner's opposition.[4] Ms. Parker witnessed service of Petitioner's papers on the court by Petitioner's process server (R.1292, entry for CJP dated 7/10/97). Parker then informed Gerber of the facts surrounding the appearances at the calendar call (R.1292 entry for MEG dated 7/10/97). Gerber later discussed the results of the calendar call with Miller (R.1292 entry for MEG dated 7/22/97 and entry for JMM dated 7/23/97). However, neither Respondents nor Respondents' attorneys nor the attorneys' employees (Miller & Wrubel, Miller, Gerber, or Parker, respectively) have ever come forward with the evidence in their possession that Petitioner answered the call and filed papers at the call. Nor have said persons ever denied these facts or come forward with the truth when confronted by Petitioner in the proceedings heretofore. Mr. Gerber continued this misconduct before the trial court, stating before the trial court (R.391[P.310L.2]): "In addition, many of the legal services that defendants' counsel were *forced* [emphasis added] to perform were brought upon by plaintiff himself in defaulting on the motion which thereby led to our having to oppose the motion to vacate the default . . . ." [emphasis added]

The IAS court stated that no opposition papers could be found by the Clerk of the Supreme Court (IAS Court). The IAS court granted Respondents' *res judicata* motion (April Motion) on this disputed and alleged default (R.24). Rather than come forward with the truth, Respondents chose to force on Petitioner subsequent proceedings to establish that no default had occurred. All of the proceedings[5] subsequent to Parker's

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[4]Respondents claimed $9,578 in fees relative to work performed in reviewing Appellant's opposition papers and reseaching and drafting their reply papers which were lost by the Clerk of the Court and the basis of the default judgment.

[5]As calculated under the previous point, Respondents claimed a total of 179.5 hours and $35,082 for work associated with the *res judicata* motion.

attendance at the 7/10/97 were necessitated by Respondent's misconduct. Rather then tell the truth, Respondents chose to force proceedings to vacate the default, choosing to respond to the motions (orders to show cause) rather than tell the truth. Petitioner was not aware that Respondents had withheld this crucial information from the courts nor that Respondents were responsible for unnecessary judicial proceeding as a result of this misconduct until receipt of the transcript in 1999 (the *res judicata* proceedings took place before the IAS court below in 1997). See A. 178a-179a for evidence of misconduct cited.

c. Fees Associated With Respondents' Motion For Extension Of Time To Respond To The Complaint As Well As Respondents' Personal Jurisdiction Motion Were Procured By Calculated Efforts To Obstruct Justice, To Evade Service On LaFergola, And To Burden Petitioner

Legal fees appearing on Defendants' 1 (R.1273-1311) for Respondents' application for an extension of time to respond to the Complaint and Respondents' personal jurisdiction motion (LaFergola Motion) were unnecessary and the result of Respondents' misconduct. These two efforts we undertaken wholly as a result of Respondents' calculated efforts to obstruct justice, evade service on LaFergola and to cause Petitioner unnecessary burden.

The full appreciation of Respondents' misconduct as to the motion to extend the time to respond to the Complaint and Respondents' personal jurisdiction motion can only be had when seen in light of Gerber's claim to the trial court that

> "The evidence will show the <u>*complexity*</u> [emphasis added] of the pro se plaintiff's papers in this action, the *procedural hurdles* [emphasis added] which defendant had to face in successfully defending this action, the

> *efficiency* [emphasis added] in which defendant's counsel acted and the reasonableness of the counsel fees." (R.84[P.3L.20])

and after one understands that Respondents' attorneys Miller and Gerber appeared for Respondent LaFergola as early as *January 7, 1997*, if not earlier. This fact was established at trial in testimony and statements made on Respondents' behalf. See A. 183a-184a.

These statements by Gerber to the trial court were neither modified nor contradicted by Miller as he sat under oath and heard the statements by Gerber.

Further, that Miller and Gerber were already representing LaFergola and the other named Respondents at the time Respondents refused Petitioner's request that service of the Summons and Complaint on LaFergola's behalf be accepted by his attorneys by the following excerpt from the proceedings at trial regarding Respondent's requests for an extension of time to respond to the Complaint (R.178[P.97L.12]):

> [MILLER] THE WITNESS: The time for those who were served was coming up and we wanted to be able to make a single motion because we thought it would be more efficient both for ourselves, *and our clients* [emphasis added] and for the Court if there was one motion made. We approached Mr. Kliebert, requesting that adjournment. We did it in writing. I believe Mr. Kliebert refused to --

And R.180[P.99L.]:

> THE COURT: What did you want in these stipulations?
>
> [MILLER] THE WITNESS: We wanted to extend the time for *all defendants* [emphasis added] to answer or respond or move with respect to the complaint.

Contrary to Gerber's claims above about what the evidence shows, the evidence at trial shows that not only did Respondents' counsel not act efficiently, but that lion's share of the proceedings were necessitated as a result of Respondents' intent to burden Petitioner with unnecessary work, to evade service on LaFergola, and to obstruct justice; that the only "procedural hurdles" Respondents had to face were those created by their own acts of misconduct and Respondent's efforts to obstruct justice. And as to the "complexity of the pro se plaintiff's papers in this action" Respondents argued to the IAS court below (which made the award of attorneys fees on the grounds of *res judicata* in 1997) that the facts and causes of action in the instant complaint were essentially identical to those in a prior proceeding (McKoan) at which the very same attorneys -- Miller & Gerber of Miller & Wrubel -- appeared and successfully defended.

Rather than refuse an extension as Respondents testified at trial, Petitioner agreed (R.938) to Respondents' request (R.933) for an extension of time if Respondents would agree to authorize their attorneys to accept service of the Summons and Complaint on the named Respondents who remained to be served (Lafergola, Kidder Group, and Kidder). This request was appropriate, reasonable and sparing of expense, and as evidence at trial shows (see above statements by Miller & Gerber before the trial court), Miller & Wrubel was already appearing for LaFergola at the time they requested an extension.

Further, evidence that Miller & Wrubel were appearing for all the named defendants at the time they refused to accept service on LaFergola can be found in the record in the proceedings before trial. Respondents' attorney Gerber had already indicated in the letter requesting an extension that Miller & Wrubel was appearing for all the named Respondents (just as Miller & Wrubel has appeared for all the named Respondents

except Cerullo in the prior action, McKoan). Quoting from the fifth paragraph in Gerber's letter (R.933):

> "In the event that additional named defendants are served with the Summons and Complaint, *we request that the time for such additional named defendants to respond to the Complaint* [emphasis added] be extended for sixty days from the latest date of completion of service upon all such additional named defendants, or be extended to April 18, 1997, whichever extension date is later."

Gerber here was clearly speaking for "such additional named defendants" -- Lafergola, Kidder Group and Kidder -- by requesting on their behalf "that the time for such additional named defendants to respond to the Complaint be extended for sixty days from the latest date of completion of service upon all such additional named defendants, or be extended to April 18, 1997, whichever extension date is later". Incongruously, Gerber refused to accept service for Lafergola while agreeing to accept service for Kidder Group and Kidder. In his letter (R.935-936) agreeing to accept service for Kidder Group but refusing to accept service for LaFergola, Gerber states:

> "Please be informed that this office has not been authorized to receive or accept service of the Summons and Complaint on behalf of Mr. LaFergola."

Gerber expanded upon his earlier statement that the attorneys had not been authorized to receive or accept service of the Summons and Complaint in a follow up letter (R.937-938) dated January 31, 1997:

> "As I explained in my fax to you yesterday, Mr. LaFergola has not consented to this firm receiving or accepting service of the Summons and Complaint on his behalf in the current action. . . ."

Despite Lafergola's (or Respondents', or Respondents' attorneys') refusal to permit acceptance of service upon their attorneys, Petitioner was still willing to agree to Respondents' stipulation for an extension of time to respond conditioned upon Respondents' agreement that Miller & Wrubel would not represent Lafergola later in any proceeding related to this action.

Petitioner proposed this stipulation based on his belief that Respondents' were acting in bad faith and attempting to evade service on LaFergola. Respondents refused and the proceedings for an extension of time to respond and the subsequent motion for dismissal due to lack of personal jurisdiction ensued.

Petitioner's stipulation was reasonable and easily effected were it not for Respondent's determined resolve to evade service on LaFergola. The grounds for the request are stated in Petitioner's letter (R.939):

> . . . This [refusal to accept service on behalf of Lafergola while accepting service on behalf of Kidder Group and Kidder]is inapposite to your earlier invocation of appropriateness, reasonableness, efficiency and common professional courtesy.
>
> Your letter fails to explain why your firm is "authorized" to accept service for Kidder Group and Kidder (and to presumably appear for them) and not authorized to receive or accept service on behalf of Lafergola. My concerns over the issue of good faith is based on the fact that you and your firm represented all the named defendants (except for Cerullo) in Kliebert v. McKoan, et al.; that General Electric has responsibility for Lafergola's legal expenses in this case; and that the defendants have a history of making bad faith requests for extensions of time and of

creating unnecessary delay and expense (see Kliebert v. McKoan et al).

I suggest that you clarify the issue of authorization as to Lafergola with Lafergola and the defendants and set it forth in writing to me. Should you be unable to obtain authorization, for whatever reason, I will agree to the stipulation as faxed to me today, given the addition to the stipulation that you, your firm, or any person in the employ of your firm be barred from representing Lafergola in this suit or in state or federal appeals resulting from decisions in this suit.

I believe it is appropriate, reasonable and efficient for your firm to agree to receive and accept service for Lafergola. I believe it is within your firms power to obtain any authorization that might be necessary. [emphasis added]

Please advise.

Further, evidence at trial in the form of testimony by Miller shows that the decision to refuse service was not made by LaFergola but was made either by Respondents' attorneys or Respondents. See A. 188a-191a for testimony.

The Court is also asked to take special note of Gerber's statement to the trial court as to LaFergola's ability to make the simplest of decisions: to consent to have his attorneys' accept service on his behalf: "I don't believe a layperson knows anything about accepting service." But certainly attorneys Miller and Gerber did. And certainly the attorneys at Kidder and General Electric did.

The reasons for Respondents' refusal to permit the most reasonable of reasonable requests -- that of Petitioner's request

of service upon LaFergola attorneys[6] -- the reasonableness of which is underscored by the fact that Respondents attorneys would accept service upon Kidder Group and Kidder -- are Respondents' efforts to evade service on LaFergola and Respondents' desire to unnecessarily burden Petitioner. An explanation for Respondents' reasons for evading service on LaFergola can be found in the Complaint. On April 28, 1995 at a meeting between LaFergola, other Kidder employees, and Petitioner, LaFergola had indicated his willingness to tell the truth about the false statements he was made to make in the underlying misdemeanor proceeding. As stated in the Complaint (R.632, par. 22 (c)), LaFergola admitted at this meeting that:

> "the statements attributed to him [LaFergola] in the misdemeanor complaint are false, that they were composed by the corporate Defendants, that prior to making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that LaFergola denied repeatedly that these words were said by Petitioner or that anything threatening was said by Petitioner in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, LaFergola has stated to witnesses that Cerullo told him not to be concerned about making false statements owing to Defendants' influence in the District Attorney's Office."

The refusal to accept service upon Respondents' attorneys regardless of whether the decision was made by Respondents' or LaFergola was at its worst a purposeful and conscious attempt to avoid service on LaFergola, or, at its best,

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[6]And as evidence at trial established, Miller and Gerber were appearing for LaFergola as early as January 7, 1997, if not earlier.

an effort to unnecessarily burden Petitioner by denying Petitioner and an efficient and reasonable request.

It was improper for the trial court to allow these claims in its judgment. See A. 193a-194a for calculations.

d. Respondents' Related Misrepresentations Before The Court Of Appeals

Respondents by their attorneys Miller & Wrubel were dishonest before the Court of Appeals in their Memorandum of Law In Opposition to Motion Seeking Permission To Appeal, Or, Alternatively, An Appeal As of Right bearing the signature of attorney Michael E. Gerber and offered to the Court of Appeals in opposition to Petitioner's motion for, among other things, permission to appeal the prior appeal in the instant case. According to attorney Gerber, Petitioner's appeal "presents for review no novel legal questions" (Gerber at page 2 of the memorandum). Attorney Gerber's statement is impeached by his own sworn testimony before the trial court in proceedings related to this appeal. In the proceedings before the trial court, Gerber states under oath in an attempt to justify an amended demand for $76,863.31 in attorney's fees that:

> ". . . many of these claims [Petitioner's 19 causes of action in General Electric] were, in my opinion, novel . . . ".

Attorney Gerber here labels Petitioner's claims as "novel" in contrast to his claims before the Court of Appeals.

Similarly, Respondents' asserted in the proceedings before the IAS court that the Complaint was frivolous. But before the trial court, Respondents' reversed this argument. Before the trial court Respondents' claimed that the work the trial court ruled to be unreasonable was crucial because of the novel questions and the substantial questions of law presented by Petitioner's Complaint. By Respondents' own claims, there was no basis for the award of attorneys fees since, rather than

being frivolous, the Complaint raised novel questions and substantial questions of law that said substantial and novel questions were of such magnitude that attorneys Miller and Gerber required weeks of dedicated legal expertise and research (purportedly valued at an amended $76,863.31) in order to defeat Petitioner's claims. Any fee award is inappropriate and unlawful given Respondents' attorneys' own arguments for the merit of Petitioner's Complaint. Respondents' attorneys' bad faith arguments here and before the Court of Appeals is additional basis for reversal of the attorneys' fee award.

4. It Was Wrong For The Trial Court To Admit Into Evidence Defendants' 1 And The Testimony Of Miller As The Credibility Of Each Was Impeached By Evidence At Trial And Owing to The Existence Of Best Evidence and Respondent's Willful Disregard For The Subpoena

Respondents submitted as prima facie evidence of the attorneys' fees paid by Respondents Defendants' 1 (R.1273-1311[Client Statement Report and supporting invoices and "record"(s)]) and the testimony (R.90-288[P.9-P.207]) of Joel M. Miller, senior partner at Miller & Wrubel. Petitioner's counsel objected to the introduction of Defendants' 1 into evidence and challenged the truthfulness of Miller's testimony. Petitioner's counsel later called Gerber to the stand to impeach testimony by Miller and Defendant's 1. Miller's testimony, and later Gerber's testimony, impeached Respondent's claims for the authenticity and truthfulness of the documents in Defendants' 1 was further impeached by inconsistencies between the documents themselves. In turn, the documents in Defendant's 1 impeached the creditworthiness of the testimony by Miller as well as by Gerber. See A. 204a-212a for testimony.

As seen from the excerpts above Miller claimed that all the amounts alleged on the Client Statement Report and the invoices had been paid by either Kidder Peabody or General

Electric. Fees claimed on the individual invoices were "determined by the computer compiling the number of hours billed by each timekeeper, which is shown on the following pages, times the hourly rate that is shown "after I [Miller] review the hours that were billed to determine that they are appropriate". According to Miller's testimony here, he (Miller) reviews all the hours that are billed to determine whether they are appropriate before the computer compiles the amounts for the invoices.

Petitioner's counsel challenged the truthfulness of Miller's & Gerber's statements (and later Gerber's testimony) that all the invoices were paid asserting that the subpoena required Respondents to produce all documents relating to fees and expenses incurred and paid by Respondents in the instant case. This required evidence of all of Respondents' original bills and any modifications as well as all bills, time records as well as all documents, manuals, and protocols on the procedures required in producing these documents in the possession of Miller & Wrubel[7]. Respondents willfully disobeyed the subpoena and did not produce the requested documents.

The Court is asked to note that the invoices (monthly bills) were never alleged by Miller and Gerber to be the original invoices sent to Respondents. There is no evidence at trial that these invoices were sent to the Respondents. There is no evidence at trial that these were the only invoices send to Respondents. There is no evidence that they were paid as alleged. Further, and importantly, neither Miller nor Gerber ever allege that the invoices annexed to Statement were paid *in full*.

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[7]Appellant states this on information from Mr. Rosenkrantz. Mr. Rosenkrantz could not locate the subpoena or any correspondence relative to the subpoena. Appellant asked Respondents for a copy of the subpoena and correspondence relative to the subpoena but Respondents refused Appellant's request.

Petitioner's counsel challenged the admissibility of the Defendants' 1 and challenged the admissibility of Miller's testimony as hearsay and Respondents presentation of Miller as the business record exception to hearsay. The trial court initially agreed with Petitioner's counsel but reversed itself later. See A. 214a-215a.

As seen from the excerpts of testimony above Miller claimed that all the amounts alleged on the Client Statement Report and the invoices had been paid by either Kidder Peabody or General Electric. Fees claimed on the individual invoices were "determined by the computer compiling the number of hours billed by each timekeeper, which is shown on the following pages, times the hourly rate that is shown "after I [Miller] review the hours that were billed to determine that they are appropriate". According to Miller's testimony here, he (Miller) reviews all the hours that are billed to determine whether they are appropriate before the computer compiles the amounts for the invoices.

Miller's testimony established that the documents in Defendants' 1 (R.1273-1311) were neither authentic nor true. Miller testified that "at the beginning of each month the administrator provides a record such as 1.3 [R.1275] and 1.4 [R.1276] to the billing department in order to prepare a bill [invoice]." Clearly, the "record[s]" in Defendants' 1 are not the records alleged to have been sent to the billing department at the beginning of each month. All of the "record[s]" in Defendants' 1 are dated mid month. The chart below is based on Defendants' 1 and lists the date of the invoice and the date on the "record[s]" annexed to each invoice. Miller testified that the invoices are compiled on the basis on the "record[s]" which are sent by the "administrator" "at the beginning of each month" "to the billing department in order to prepare a bill [invoice]". Besides establishing that these are the "record[s]" upon which the invoices were prepared, the chart shows that several of the invoices were prepared *before* the billing department received

the "record[s]". Examples, the billing department received the "record[s]" upon which the 4/9/97 invoice was compiled 2 days after (on 4/11/97) the invoice was compiled; the billing department received the "record[s]" upon which the 10/14/97 invoice was compiled 1 day after (on 10/15/97) the invoice was compiled; the billing department received the "record[s]" upon which the 12/9/97 invoice was compiled 1 day after (on 12/10/97) the invoice was compiled; the billing department received the "record[s]" upon which the 3/12/97 invoice was compiled 1 day after (on 3/13/97) the invoice was compiled. See A. 216a for compilation.

Further testimony at trial established that no independent record of payment (i.e., canceled checks) existed that established Respondents had indeed paid the amounts which Miller and Gerber testified were paid. Respondents claimed to show the trial court checks that alleged to show that Miller & Wrubel had been paid the amounts on the Client Statement Report. What it did show was that Miller & Wrubel had received checks from Respondents which were not in the amounts alleged in Defendants' 1 and that Miller had received payments from Respondents for work other than work performed on the instant case.

Miller's and Gerber's continued efforts to explain away the incongruity between the amounts on the checks and the amounts on the invoices only further eroded the truthfulness of their claims. Miller and Gerber claimed that Respondents combined payments for various matters on the same check, that is, they combined moneys owed Miller & Wrubel for various matters and including matters not related to the instant case. That Respondents combined different matters and cases on the same check is discredited by the evidence that Respondents issued 2 separate checks on the same date for 2 different invoices -- rather than combine matters and cases as Miller and Gerber claim -- as shown by the chart below:

Payment Date	Invoice Date	Invoice Amount	Face Amount On Check
8/97	5/13/97	27451.87	$72,840.19
8/97	7/15/97	4771.64	same
11/97	9/10/97	5884.48	same
11/97	10/14/	2266.78	same
12/97	8/8/97	7067.99	same
12/97	11/12/97	3723.49	same

Miller & Gerber alleged that the 8/97 payment of $72,840.19 check included the monies owed on the 5/13 invoice as well as other monies owed by Respondents for other matters. Respondents did not explain why -- if Respondents combined payments for different matters -- combined payment for other matters on this check but, paradoxically, cut a separate check on the same date for the 7/15 invoice which Respondents paid at the same time as the 5/13 invoice. Similarly, Miller could not explain why Respondents, who combined payments for different cases on the same check, cut separate checks on 11/97 for the 9/10 and 10/14 invoices and on 12/97 for the 8/8 and 11/12 invoices.

As to the contradictions in Miller's and Gerber's testimony, the following excerpts from the transcript are cited beginning at R.238-240[P.157L.21-P.159L.18]. The Court is respectfully directed to the footnotes for relevant comment and argument by Petitioner. See A. 217a-220a for testimony.

The testimony by Miller and Gerber above impeaches the authenticity of the documents in Defendant's 1. Additionally Gerber's testimony impeaches Miller's testimony. Further, the testimony establishes that Respondents willfully disregarded the subpoena denying Petitioner's counsel the opportunity to further impeach Defendant's 1, and testimony by Miller & Gerber.

For the evidence at trial and the reasons stated above, it was wrong for the trial court to permit Defendant's 1 or Miller's testimony into evidence.

5. Terms Of Injunction Unprecedented And Inappropriate

Respondents misled the courts in the proceedings below by citing precedent for their demand for injunction under the circumstances of the instant case. In the instant case, injunction was granted without explicit adjudication on the merits of such a demand and without the option of pursuing any further action on the underlying facts either with permission of the court or by counsel. There is no such precedent. Respondents citations provide no basis for their demand for an injunction against a pro se Petitioner without either the option of Petitioner pursuing a future action with representation by counsel or after review by and with permission of the court. In each of the decisions involving a pro se litigant cited by Respondents there is review and discussion by the court on the issue of injunction and the plaintiff is permitted to either pursue future litigation represented by counsel or after review by and with permission of the court. The courts erred and abused their discretion by not permitting Petitioner the option of pursuing litigation either (1) under representation by counsel or (2) with court approval. Injunction under the circumstances of the instant case unprecedented, inappropriate and denies Petitioner's constitutional right to fair and equal treatment before the law and due process (5th & 14th Amendments).

Argument Point II.
ISSUES OTHER THAN ATTORNEYS' FEES AND INJUNCTION
Petitioner Was Denied His Constitutional Rights To Fair And Equal Treatment Before The Law And To Substantial and Procedural Due Process

Due to page limit restrictions the remaining deprivations of Petitioner's constitutional rights are incorporated by reference to Petitioner's claims in his papers to the New York Court of Appeals (A. 86a-312a) under Arguments starting at A. 144a with facts and procedural history stated at pages 86a through 143a. Such inclusion is to the extent as may be permitted by Court rule, discretion or in the interests of substantial justice.

CONCLUSION

Petitioner respectfully requests that the decisions of the New York State courts be summarily reversed. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

John V. Kliebert
3800 Coral Springs Drive
Coral Springs, Florida 33065
954-346-9882
September 26, 2000

State Of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION June 29, 2000

1-12 Mo. No. 612
John V. Kliebert,
Appellant,
v.
General Electric Company,
Incorporated, et al.,
Respondents

Motion for leave to appeal denied.
Motion for permission to expand the record on appeal denied.
Chief Judge Kaye took no part.

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of June 2000

Present, Hon. Joseph W. Bellacosa,
Senior Associate Judge, Presiding

1-12 Mo. No. 612

John V. Kliebert,
Appellant,

v.

General Electric Company, Incorporated, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals and for permission to expand the record on appeal in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliveration having been thereupon had, it is

ORDERED, that the said motion for permission to expand the record on appeal be and the same hereby is denied. Chief Judge Kaye took no part.

"s/ Stuart M. Cohen"
Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 6, 2000.

Present: Hon. Ernst H. Rosenberger Justice Presiding
Betty Weinberg Ellerin
Richard W. Wallach
Alfred D. Lerner
Richard T. Andrias, Justices.

----------X

John V. Kliebert,

Plaintiff-Appellant,

-against-

M-1300
Index #121949/96

General Electric Company, Incorporated, et al.,

Defendants-Respondents.

----------X

Plaintiff-appellant having moved, inter alia, for reargument of, or in the alternative, for leave to appeal to the Court of Appeals from, the decision and order of this Court entered on January 18, 2000 (Appeal Nos. 3101-3104N),

NOW, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED that the motion is denied in its entirety, with $100 costs.

ENTER:

"s/ Catherine O'Hagan Wolfe"
Catherine O'Hagan Wolfe
Clerk

Rosenberg, J.P., Ellerin, Wallach, Lerner, Andrias, JJ.

3103-
3104N John V. Kliebert,
Plaintiff-Appellant

Pro Se

-against-

General Electric Company, Incorporated, et al.,
Defendants-Respondents.

Joel M. Miller

Judgment, Supreme Court, New York County Robert Lippmann, J.), entered June 3, 1998, in favor of defendants and against plaintiff in the amount of $60,000, unanimously affirmed, with costs. Appeal from order, same court (Elliott Wilk, J.), entered September 25, 1997, which denied plaintiff's motions to vacate his defaults in opposing defendants' prior motion to dismiss the complaint, unanimously dismissed, without costs, such order already having been affirmed by this Court (254 AD2d 197).

The value of defendants' attorneys' services, which plaintiff was directed to pay as a sanction for frivolous conduct, were reasonably assessed at $60,000. Plaintiff's other arguments are without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 18, 2000

"s/ Catherine O'Hagan Wolfe"
Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. ROBERT D. LIPPMANN Part 52

Justice

INDEX NO. 121949-96

Kliebert

MOTION DATE 6-10-99

- v -

MOTION SEQ. NO. 007

Gen. Electric etal

MOTION CALL NO.

The following papers, numbered 1 to ___ were read on this motion to/for _____

	[] PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits ___	[] _____
Answering Afidavits - Exhibits__	[] _____
Replying Affidavits_____	[] _____

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion:

Plaintiff by his attorney moves to vacate the Court's Judgment after trial dated June 3, 1998.

The present motion to reargue was made April 20, 1999, well after what would have been required procedurally considering the Court's order of August 11, 1998. The motion is, therefore, denied.

Dated: 6/10/99 "s/ Robert D. Lippmann"

J.S.C.

ROBERT D. LIPPMANN

Check one:

[X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

DATED: _____ J.S.C

At IAS Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, located at 80 Centre Street, New York, New York on the 12 day of August, 1998

PRESENT:

HON. ROBERT D. LIPPMANN,
Justice.

----------X

JOHN V. KLIEBERT, Index. No. 96/121949

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INC, **ORDER**
KIDDER PEABODY GROUP, INC,
KIDDER PEABODY & CO., INC,
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25,

Defendants

----------X

Plaintiff *pro se* John V. Kliebert, having moved for an Order vacating the Judgment of this Court, entered June 3, 1998, which adjudged that defendants, General Electric Company (s/h/a "General Electric Company, Incorporated"), Kidder, Peabody Group Inc. (s/h/a "Kidder Peabody Group, Incorporated"), Kidder, Peabody & Co. Incorporated (s/h/a "Kidder Peabody & Company, Incorporated"), Edward A. Cerullo, Richard LaFergola and Joel "JJ" McKoan (collectively "Defendants"), recover from Plaintiff counsel fees in the amount of $60,000;

AND, Defendants, by their attorneys, Miller & Wrubel P.C., having opposed plaintiff's motion to vacate the Judgment;

AND, the motion to vacate the Judgment having regularly come on to be heard before the Court (Hon. Robert C. Lippman), and due deliberation having been held thereon,

AND, the Court (Hon. Robert D. Lippman) having rendered its decision denying the motion to vacate the Judgment, on the record, on August 6, 1998 (a copy of the transcript of the Court's decision, dated August 6, 1998, is annexed hereto as Exhibit A);

NOW, upon motion of Miller & Wrubel P.C., attorneys for Defendants, it is

ORDERED, that plaintiff's motion to vacate the Judgment is denied; and it is further

ORDERED, that the clerk is directed to enter this Order and the original transcript of the decision , dated August 6, 1998, denying the motion to vacate the Judgment.

ENTER:

"s/ Robert D. Lippmann"
J.S.C.
ROBERT D. LIPPMANN

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. _ROBERT D. LIPPMANN_Part ___52____
Justice

---------- INDEX NO._121949/96_
KLIBERT MOTION DATE_____
- v - MOTION SEQ. NO._06_
GENERAL ELECTRIC MOTION CALL NO._

The following papers, numbered 1 to ___ were read on this motion to/for_____

	[]	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits ___	[]	_____
Answering Afidavits - Exhibits__	[]	_____
Replying Affidavits_____	[]	_____

Cross-Motion: [ ] Yes [X] No
Upon the foregoing papers, it is ordered that this motion

Motion to vacate judgment denied as there is no legal basis for doing it

Dated: _____8/6/98_____ "s/ Robert D. Lippmann"
J.S.C.
ROBERT D. LIPPMANN

Check one:
[X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE_____
DATED:_____ J.S.C

At IAS Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, located at 80 Centre Street, New York, New York, on the 3 day of June 1998

PRESENT:

HON. ROBERT D. LIPPMANN,
Justice.

----------X

JOHN V. KLIEBERT, Index. No. 96/121949

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INC, **JUDGMENT**
KIDDER PEABODY GROUP, INC,
KIDDER PEABODY & CO., INC,
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25,

Defendants

----------X

A hearing in the above-captioned action to determine the amount of attoneys' fees to be awarded to defendants, General Electric Company (s/h/a "General Electric Company, Incorporated"), Kidder, Peabody Group Inc. (s/h/a "Kidder Peabody Group, Incorporated"), Kidder, Peabody & Co. Incorporated (s/h/a/ "Kidder Peabody & Company, Incorporated"), Edward A. Cerullo, Richard LaFergola and Joel "JJ" McKoan, (collectively "Defendants"), was held at Individual Assignment Part 52 of this Court on June 1 and 2, 1998.

Defendants appeared by their attorneys, Miller & Wrubel P.C. Plaintiff, John V. Kliebert, appeared by his attorney, Donald Rosenkrantz, P.C.

The Court (Hon. Robert D. Lippmann) rendered its decision from the bench on June 2, 1998.

The Court ordered that Defendants recover from plaintiff, John V. Kliebert, attorneys' fees in the amount of $60,000.00, and directed that judgment be intered before the Court.

NOW, motion of Miller & Wrubel P.C., attorneys for Defendants, it is

ADJUDGED, that Defendants, c/o Miller & Wrubel P.C., As Attorneys, 250 Park Avenue, New York, New York 10177, recover from plaintiff, John V. Kliebert, 3800 Coral Springs Drive, Coral Springs, Florida 33065, attorneys' fees in the amount of $60,000.00.

Judgment entered this ____ day of June, 1998.

ENTER:

"s/ Robert D. Lippmann"
J.S.C.

_____
CLERK

ROBERT D. LIPPMANN

Norman Goodman
Clerk

State of New York, Court of Appeals

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the ninth day
of September 1999

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 786

John V. Kliebert,

Appellant,

v.

General Electric Company,
Incorporated, et al.,

Respondents.

A motion for clarification and reargument to the Court of Appeals in the above cause having been therfore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

"s/ Stuart M. Cohen"
Stuart M. Cohen
Clerk of the Court

State of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of June 1999

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

1-10 Mo. No. 387

John V. Kliebert,

Appellant,

v.

General Electric Company, Incorporated, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

"s/ Stuart M. Cohen"

Stuart M. Cohen
Clerk of the Court

Sullivan, J.P., Rosenberger, Nardelli, Williams, Andrias, JJ.

2440 John V. Kliebert

Plaintiff-Appellant,

Pro Se

-against-

General Electric Company,
Incorporated, et al.,

Defendants-Respondents.

Joel M. Miller

Order, Supreme Court, New York County (Elliott Wilk, J.), entered September 25, 1997, which denied plaintiff's motions to vacate his defaults in opposing defendants' prior motions to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff fails to demonstrate both a reasonable excuse for the defaults and a meritorious claim, the action being nothing more than an effort to revive claims based upon the same facts alleged in a previously dismissed action (228 AD2d 232, lv denied 89 NY2d 802), but now asserted in the guise of different legal theories (see, Matter of Sud v Sud, 227 AD2d 319; Corto v Lefrak, 203 AD2d 94, lv dismissed 86 NY2d 774; Couri v Westchester Country Club, 186 AD2d 715, lv dismissed, lv denied 81 NY2d 912). We have considered plaintiff's remaining arguments and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 1998

"s/ Catherine O'Hagan Wolfe

CLERK

At IAS Part 6 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, located at 60 Centre Street, New York, New York, on the _____day of October, 1997

P R E S E N T :
HON. ELLIOTT WILK,
Justice.

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949

ORDER

[1] Defendants, General Electric Company (s/h/a "General Electric Company, Incorporated"), Kidder, Peabody Group Inc. (s/h/a "Kidder Peabody Group, Incorporated"), Kidder, Peabody & Co. Incorporated (s/h/a "Kidder Peabody & Company, Incorporated"), Edward A. Cerullo, Richard LaFergola and Joel "JJ" McKoan (collectively "Defendants"), by their attorneys, Miller & Wrubel P.C., having duly moved for an Order pursuant to CPLR 3211 (a) (5) and (7) dismissing

the Complaint of plaintiff John V. Kliebert ("Plaintiff"), pursuant to 22 NYCRR 130-1 imposing sanctions upon Plaintiff, and enjoining Plaintiff from commencing further litigation in connection with the allegations underlying the Complaint (the "Motion");

[2] AND, Plaintiff having defaulted on the Motion when it regularly came on to be heard by serving opposition papers which were not put before the Court;

[3] AND, the Court having rendered a short-form Order, dated July 14, 1997, granting the Motion on default (a copy oF which is annexed hereto as Exhibit A);

[4] AND, Plaintiff having moved to vacate the default and Defendants having opposed vacatur of the default;

[5] AND, the Court having rendered a Decision and Order, dated Sptember 16, 1997, denying Plaintiff's motion, to vacate the default (a copy of which is annexed hereto as Exhibit B);

[6] Now, upon reading and filing the Notice of Motion, dated April 18, 1997, the Affidavit in support of the Motion of Michael E. Gerber, Esq., sworn to April 18, 1997, the exhibits annexed hereto, the Memorandum of Law in support of the Motion, dated April 18, 1997, the Reply Memorandum of Law in support of the Motion, dated July 8, 1997, the order to show cause, dated August 5, 1997 (no.003), seeking vacatur of the default, the Affidavit of Plaintiff, sworn to July 31, 1997, in support of the order to show cause, the exhibit annexed thereto, the Affidavit of Michael E. Gerber, Esq., sworn to August 25, 1997, in opposition to the order to show cause, and Plaintiff's supplemental affidavit and memorandum of law, dated August 25, 1997, in support of the order to show cause;

[7] AND, after due deliberation having been held thereon;

[8] NOW, upon motion of Miller & Wrubel P.C., attorneys for Defendants, it is

[9] ORDERED, that Plaintiff is enjoined from commencing further litigation or other proceedings seeking relief in connection with the allegations underlying the Complaint; and it is further

[10] ORDERED, that Defendants may settle a judgment dismissing Plaintiff's Complaint and enjoining Plaintiff from commencing further litigation or other proceedings seeking relief in connection with the allegations underlying the Complaint; and it is further

[12] ORDERED, that Defendant's be awarded their attorneys' fees, an an amount to be fixed by the Court in a separate hearing, that the issue of attoprneys' fees is severed and that Defendants may file a Note of Issue to obtain a hearing date on the issue of attorneys' fees.

ENTER:

"s/ _____"
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949
IAS Part 6
Hon. Elliott Wilk

NOTICE OF SETTLEMENT
OF ORDER

PLEASE TAKE NOTICE that, the annexed proposed Order will be presented to the Supreme Court, New York County (Hon. Elliott Wilk), at the Courthouse, 60 Centre Street, IAS Part 6, Room 341, New York, New York, on October 14, 1997, at 9:30 a.m., for settlement and signature.

Dated: October 1, 1997

Yours, etc.,
MILLER & WRUBEL P.C.
250 Park Avenue
New York, New York 10177-0699
(212) 336-3500
Attorneys for Defendants

TO: MR. JOHN V. KLIEBERT
3800 Coral Springs Drive
Coral Springs, Florida 33065
(954) 796-9029

Plaintiff pro se

IAS Part 6 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, located at 60 Centre Street, New York, New York, on the _____day of October, 1997

P R E S E N T :
HON. ELLIOTT WILK,
Justice.

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949

ORDER

[1] Defendants, General Electric Company (s/h/a "General Electric Company, Incorporated"), Kidder, Peabody Group Inc. (s/h/a "Kidder Peabody Group, Incorporated"), Kidder, Peabody & Co. Incorporated (s/h/a "Kidder Peabody & Company, Incorporated"), Edward A. Cerullo, Richard LaFergola and Joel "JJ" McKoan (collectively "Defendants"), by their attorneys, Miller & Wrubel P.C., having duly moved for an Order pursuant to CPLR 3211 (a) (5) and (7) dismissing

the Complaint of plaintiff John V. Kliebert ("Plaintiff"), pursuant to 22 NYCRR 130-1 imposing sanctions upon Plaintiff, and enjoining Plaintiff from commencing further litigation in connection with the allegations underlying the Complaint (the "Motion");

[2] AND, Plaintiff having defaulted on the Motion when it regularly came on to be heard by serving opposition papers which were not put before the Court;

[3] AND, the Court having rendered a short-form Order, dated July 14, 1997, granting the Motion on default (a copy oF which is annexed hereto as Exhibit A);

[4] AND, Plaintiff having moved to vacate the default and Defendants having opposed vacatur of the default;

[5] AND, the Court having rendered a Decision and Order, dated Sptember 16, 1997, denying Plaintiff's motion, to vacate the default (a copy of which is annexed hereto as Exhibit B);

[6] Now, upon reading and filing the Notice of Motion, dated April 18, 1997, the Affidavit in support of the Motion of Michael E. Gerber, Esq., sworn to April 18, 1997, the exhibits annexed hereto, the Memorandum of Law in support of the Motion, dated April 18, 1997, the Reply Memorandum of Law in support of the Motion, dated July 8, 1997, the order to show cause, dated August 5, 1997 (no.003), seeking vacatur of the default, the Affidavit of Plaintiff, sworn to July 31, 1997, in support of the order to show cause, the exhibit annexed thereto, the Affidavit of Michael E. Gerber, Esq., sworn to August 25, 1997, in opposition to the order to show cause, and Plaintiff's supplemental affidavit and memorandum of law, dated August 25, 1997, in support of the order to show cause;

[7] AND, after due deliberation having been held thereon;

[8] NOW, upon motion of Miller & Wrubel P.C., attorneys for Defendants, it is

[9] ORDERED, that Plaintiff is enjoined from commencing further litigation or other proceedings seeking relief in connection with the allegations underlying the Complaint; and it is further

[10] ORDERED, that Defendants may settle a judgment dismissing Plaintiff's Complaint and enjoining Plaintiff from commencing further litigation or other proceedings seeking relief in connection with the allegations underlying the Complaint; and it is further

[12] ORDERED, that Defendant's be awarded their attorneys' fees, an an amount to be fixed by the Court in a separate hearing, that the issue of attoprneys' fees is severed and that Defendants may file a Note of Issue to obtain a hearing date on the issue of attorneys' fees.

ENTER:

"s/ Norman Goodman
J.S.C

SUPREME COURT: NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 6

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INC.,
KIDDER PEABODY GROUP, INC.,
KIDDER PEABODY & COMPANY, INC.,
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendant.

Index No. 121949/96

Elliott Wilk, J.:

[1] In 1994, plaintiff commenced an action against his former employer, its affiliates and several co-wprkers for malicious prosecution, conspiracy and intentional infliction of emotional distress. Defendants moved to dismiss. Plaintiff cross-moved for leave to serve a second amended complaint. By order dated October 12, 1995, defendants' motion to dismiss was granted and plaintiff's cross-motion was denied. The Appellate Division Affirmed.

[2] In March 1995, plaintiff commenced this action, which is based upon the same facts as the 1994 lawsuit. In this latest action, he complains of prima facie tort, invasion of privacy, conversion, breach of fiduciary duty, breach of contract, false arrest and imprisionment, malicious prosecution, abuse of process, conspiracy, defamation, violation of Constitutional freedoms of association and speech and intentional infliction of emotional distress.

[3] Defendants General Electric et al, moved pursuant to CPLR 3211 (a)(5) and (7), for an order dismissing the complaint as barred by res judicata, collateral estoppel, claim splitting and for failure to state a cause of action. On June 20, 1997, plaintiff served opposition papers on defendants who then served reply papers. Although plaintiff claims that the process server submitted the papers to the court on the return date, July 10, 1997, they never made it to the case jacket. On July 14, 1997, the motion was granted on default.

[4] After plaintiff allegedly served defendant LaFergola with the summons and complaint, defendant LaFergola moved, pursuant to CPLR 3211 (a) (8), for an order dismissing the complaint for lack of personal jurisdiction. Plaintiff requested an adjournment in order to reply to LaFergola's motion and the General Electric motion at the same time. By stipulation dated April 3, 1997, the parties agreed that plaintiff would serve his opposition papers by June 18, 1997. Plaintiff did not serve opposition papers and LaFergola's motion was granted on default on July 14, 1997.

[5] Plaintiff now moves to vacate the default judgments. With respect to the General Electric motion, plaintiff claims that there was a "technical" default due to administrative failure in the court and that he should be granted leave to file opposing papers. In his supporting affidavit, plaintiff submits no substantive opposition to the underlying motion. Tis, he reserves, inappropriately, for his reply.

[6] In the 1995 action, plaintiff attempts to revive claims clothed in different legal theories, based upon the same facts that underlie the action dismissed in 1994.

[7] In the second motion, plaintiff claims, as an excuse, that he "inadvertently failed to submit an answer" because he was "intensely involved with submitting [his] answer on the

other motion." Plaintiff does not address the fact that he requested in writing and later stipulated to an adjournment on the motiom. The merits of his claim against LaFergola have no more substance than the merits against LaFergola's co-defendants.

[8] Plaintiff's motions are denied.

[9] This constitutes the decision and order of the court.

DATED: September 16, 1997

"s/ Norman Kraiman"
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. __ELLIOTT WILK__Part ____6_____
Justice

---------- INDEX NO.212949/96

Kliebert MOTION DATE7/10/97

- v - MOTION SEQ. NO.001

General Electric MOTION CALL NO._

The following papers, numbered 1 to ___ were read on this motion to/for_____

	[] PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits ___	[] _____
Answering Afidavits - Exhibits__	[] _____
Replying Affidavits_____	[] _____

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

is granted on default. Settle order

Dated: ____7/14/97_____ "s/ Elliott Wilk "
J.S.C.

Check one:

[] FINAL DISPOSITION [] NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE_____

DATED:_____ J.S.C

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. __ELLIOTT WILK__Part ____6_____
Justice

---------- INDEX NO.212949/96

Kliebert MOTION DATE7/10/97

- v - MOTION SEQ. NO.002

General Electric MOTION CALL NO._

The following papers, numbered 1 to ___ were read on this motion to/for_____

	[]	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits ___	[]	_____
Answering Afidavits - Exhibits__	[]	_____
Replying Affidavits_____	[]	_____

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

is granted on default. Settle order

Dated: ____7/14/97_____ "s/ Elliott J Wilk "
J.S.C.

Check one:

[] FINAL DISPOSITION [] NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE_____

DATED:_____ J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN V. KLIEBERT

PLAINTIFF

-AGAINST-

GENERAL ELECTRIC COMPANY, ET AL

DEFENDANTS

INDEX #96/121949
AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK

HARRY TORRES, BEING DULY SWORN, DEPOSES AND SAYS, THAT HE IS OVER THE AGE OF TWENTY-ONE. NOT A PART OF THIS ACTION AND RESIDES IN THE STATE OF NEW YORK.

IN THE MATTER AT HAND, YOUR DEPONENT HARRY TORRES RECEIVED FROM JOHN V. KLIEBERT / PLAINTIFF'S AFFIDAVIT AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' ACTION TO DISMISS AND FOR SANCTIONS AGAINST PLAINTIFF AND CROSS MOTION T O AMEND COMPLAINT, ALLOW FOR DISCOVERY INDEX CPLR 3211 (3), AND SET ASIDE, REVERSE, VACATE OR OTHERWISE NULLIFY THE UNCONSTITUTIONAL LAW IN MCKOAN, MACFAWN AND WARD TO BE FILED IN THE SUPREME COURT OF NEW YORK COUNTY ON THE 10TH OF JULY 1997. YOUR DEPONENT VISITED THE

COURTHOUSE AND ENTERED ROOM 130 WHERE CALENDAR CALLS WERE TAKEN PLACE. YOUR DEPONENT WAS INFORMED THAT THE ABOVE ACTION WAS CALENDAR #94. YOUR DEPONENT REMAINED SEATED TO THE CLERK CALLED CALENDAR #94 AND AT THAT TIME YOUR DEPONENT HANDED UP TO THE CLERK THE ABOVE DOCUMENTS AND LEFT THE COURT ROOM.

SWORN TO BEFORE ME ON THIS
31ST DAY OF JULY, 1997

"s/ Harry Torres "
HARRY TORRES
#91525

"s/ Tara M Anglin"
TARA M ANGLIN
Notary Public State of New York
No. 01AN5035321
Qualified in Kings County
Commission Expires Nov. 14, 1998

Sullivan, J.P., Ellerin, Rubin, Kupferman, Nardelli, JJ.

58205 John V. Kliebert,

Plaintiff-Appellant

Pro Se

-against-

Joel "JJ" McKoan, et al.,

Defendants-Respondents

Joel M. Miller

Judgment, Supreme Court, New York County (Elliott Wilk, J.), entered October 31, 1995, dismissing the amended complaint, and bringing up for review an order of the same court and Justice entered October 20, 1995, which, inter alia, granted defendants' motion to dismiss the amended complaint pursuant to CPLR 3211 (a) 1 and 7, unanimously affirmed, without costs.

Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting or bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, lv denied 80 NY2d 788). Applying the foregoing, we find that the IAS court properly dismissed, pursuant to CPLR 3211 (a) (1) and (7), the causes of action of the amended complaint seeking to recover

monetary damages for malicious prosecution inasmuch as plaintiff failed to prove that the underlying criminal action, wherein the People's misdemeanor complaint was dismissed solely because of the District Attorney's failure to plead sufficient facts to support a menacing charge, was terminated in the plaintiff's favor on the merits, a necessary element of a malicious prosecution claim (see, MacFawn v Kresler, ___NY2d___ [May 2, 1996]; Ward v Silverberg, 85 NY2d 993). The malicious prosecution causes of action were also properly dismissed since the reasonableness of, and therefore probable cause for, defendant's decision to report plaintiff's conduct to the District Attorney was amply supported by documentary evidence from plaintiff's criminal case, including plaintiff's admissions with respect to his alleged threatening statements and behavior, the discovery of weapons in one of the plaintiff's homes, and court orders directing plaintiff to undergo psychiatric treatment and to stay away from Kidder Peabody employees (see, Colon v City of New York, 60 NY2d 78, 82).

The IAS court also properly dismissed the causes of action of the amended complaint seeking monetary damages for intentional infliction of emotional distress, since plaintiff failed to allege conduct so egregious in character, and so extreme in degree, by defendants, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (see, Howell v New York Post Co., 81 NY2d 115, 121-122).

Rhe IAS court appropriately exercised its discretion in denying the cross motion by plaintiff for leave to serve a proposed second amended complaint because the amendments failed to cure the substantive defects of the amended complaint (Monaco v New York Univ. Med. Center, 213 AD2d 167, 169, lv dismissed, lv denied 86 NY2d 882). We have considered plaintiff's remaining contentions and find them to be without merit.

M-3106 Kliebert v McKoan, et al.

Motion to enlarge record denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 11, 1996

"s/ Norman Goodman"

CLERK

SUPREME COURT: NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 6

- x

JOHN V. KLIEBERT,

Plaintiff,

-against-

JOEL "J.J." McKOAN, RICHARD LAFERGOLA, KIDDER, PEABODY & CO. INCORPORATED, KIDDER, PEABODY GROUP INC. and GENERAL ELECTRIC COMPANY,

Defendants.

- x

Index No. 133170/94

ELLIOTT WILK, J. :

Defendants move, pursuant to CPLR 3211(a) (1) and (7) to dismiss the first, second, third, and fifth causes of action of the amended complaint. Plaintiff cross-moves for leave to serve a second amended complaint.

Plaintiff, John V. Kliebert, was formerly employed at defendant Kidder, Peabody & Co., Incorporated, a securities brokerage firm, as a bond trader. Defendants Joel "JJ" McKoan and Richard Lafergola were also Kidder Peabody employees. Defendants Kidder Peabody Group, Inc. and General Electric Company are Kidder Peabody affiliates. In April 1993, Kidder Peabody fired plaintiff. In December 1993, McKoan and Lafergola spoke with Investigator Nixon Frederick of the New York County District Attorney's office about encounters that they had had with plaintiff. According to Frederick's statement,

plaintiff telephoned Lafergola on November 30, 1993, and told him that he "had a list of people he wanted to get even with" and "had purchased a shotgun with four shells." Plaintiff also said that "he was going [to] the Kidder trading floor, disguise himself as a messenger carrying long stem roses or a golf bag and get [Kidder employees] Sean Farrell, Tom Egan, Brian Finkelstein and Joel McKoan." Investigator Frederick also stated that plaintiff approached McKoan near Kidder Peabody's offices and told him that he "had a list of people he wanted to eliminate" and pointed to McKoan's chest stating that his "shirt would look good with a red splotch in the chest area."

On December 16, 1993, Investigator Frederick arrested plaintiff and the New York County District Attorney's Office filed a misdemeanor complaint charging him with menacing in the third degree by making threatening statements to and about fellow Kidder Peabody employees. A search warrant was issued and a search of his apartment uncovered a number of weapons. Although plaintiff denies making violent threats or of possessing "weapons," he admits that he owns a "single pump shotgun" which he states is for deer hunting. He also admits that he owns two compounds bows, a "BB" gun, and a paint pellet gun. In October 1994, the Criminal Court dismissed the complaint, because the District Attorney failed to plead sufficient facts to support the menacing charge.

Plaintiff denies that he threatened to harm his former fellow employees. He states that he did not blame his co-workers for being fired but feels that they could

have been more supportive. Plaintiff also claims that he was harassed and intimidated by the corporate defendants who "engaged in an extreme and outrageous campaign to terrorize the plaintiff." He alleges that General Electric, Kidder Peabody, and Kidder Group inflicted severe emotional injury on him so as to "oppress, prosecute, intimidate, silence and isolate the plaintiff."

Defendants contend that they had a valid basis to report plaintiff's alleged threatening behavior to the District Attorney. They also contend that their fears were enhanced by a series of mass shootings (citing, as examples, Colin Ferguson who shot twenty people on the Long Island Railroad and Alan Winterbourne who shot four people in an unemployment office in California.)

The first cause of action is against McKoan alleging that he made false statements to New York City police officers, resulting in plaintiff's arrest on December 16, 1993, incarceration from December 16, 1993 to December 17, 1993, and subsequent prosecution. The second cause of action repeats these allegations against Lafergola. The third cause of action is against Kidder Peabody, alleging that it coerced McKoan and Lafergola to file a complaint against plaintiff. Plaintiff also alleges that Kidder carried out investigations similar to those depicted in the movie "Deadly Deception," so as to "create a false and distorted image of [plaintiff] in order to intimidate and silence him so he would not reveal" Kidder Peabody practices that violated the securities laws. Plaintiff has withdrawn the fourth and fifth causes of action for breach of contract and conspiracy, respectively.

To successfully oppose a motion to dismiss a malicious prosecution claim, plaintiff has the burden of proving that the underlying criminal action was terminated in plaintiff's favor on the merits. Ward v Silverberg, 85 NY2d 993 (1995). Here, the record demonstrated that the complaint was not terminated on the merits. It was dismissed, because the District Attorney failed to plead sufficient facts to support the menacing charge. A dismissal for legal insufficiency in neither an acquittal nor an adjudication on merits and is, therefore, insufficient to sustain a claim for malicious prosecution. MacFawn v Kresler, _____AD2d _____ (3rd Dept 1995). In dismissing the complaint, the court stated "[t]hat is not to say that this complaint does not make out aggravated harassment. Which I think is probably a more appropriate charge." The availability of a prosecution on the same facts warrants the dismissal of the malicious prosecution cause of action.

In the third cause of action, plaintiff seeks damages against Kidder Peabody for tortious infliction of emotional distress. To survive a motion to dismiss, plaintiff must allege conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," Murphy v Amer. Home Products Crop., 58 NY2d 293, 303 (1983) (quoting the restatement of Torts, Second). Reading the complaint in the light most favorable to plaintiff (Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), the allegations fall short of this strict standard.

Plaintiff's cross-motion to serve a second amended complaint is denied. When leave is sought to amend pleadings properly dismissed pursuant to 3211(a), the court must be satisfied that there are sufficient grounds tc support the proposed amended pleadings. Travelers Ins. Co. v Ferco, Inc., 122 AD2d 718 (1st Dept 1986). Such grounds are not present here. The second amended complaint contains essentially the same causes of action and the same conclusory and unsubstantiated allegations.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted; and it is further

ORDERED that the cross-motion to serve a second amended complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 10/12/95

"s/ Norman Goodman"
J.S.C.

R227

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

JOHN V. KLIEBERT

Plaintiff,

-against-

JOEL "JJ" MCKOAN, RICHARD LAFERGOLA,
KIDDER PEABODY & CO., INC.,
KIDDER PEABODY GROUP, INC., and
GENERAL ELECTRIC CO., INC.

Defendants.

----------x

Index No. 133170/94
Plaintiff(s) designates New York as the place of trial
The basis of the venue is Plaintiff's Residence

AMENDED
SUMMONS with NOTICE

Plaintiff(s) reside(s) at 3 Hanover Square
County of New York

To the above named Defendant(s)

YOU ARE HEREBY SUMMONED to answer the complaint and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after service of this summons, exclusive of the day of service or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the notice set forth below.

Dated: March 17, 1995

Defendant's Address:
SEE RIDER

Donald Rosenkrantz, P.C.
Attorney for Plaintiff
300 Park Avenue South
New York, New York 10010
(212) 598-4386

NOTICE: The nature of this action is for malicious prosecution, conspiracy and intentional infliction of emotional distress.

The relief sought is : $11,050,000.01 and $50,000 compensatory and $100,000,000 in punitive damages.

Upon your failure to appear, judgment will be taken against you by default for the sum of $111,050.000.01 with interest from December 1, 1993 and the costs and disbursements of this action.

RIDER

JOEL "JJ" MCKOAN
C/O KIDDER PEABODY GROUP, INC.
10 HANOVER SQUARE
NEW YORK, NEW YORK 10004

RICHARD LAFERGOLA
C/O KIDDER PEABODY GROUP, INC.
10 HANOVER SQUARE
NEW YORK, NEW YORK 10004

KIDDER PEABODY & CO., INC.
10 HANOVER SQUARE
NEW YORK, NEW YORK 10004

KIDDER PEABODY GROUP, INC.
10 HANOVER SQUARE
NEW YORK, NEW YORK 10004

GENERAL ELECTRIC CO., INC.
2135 EASTON TURNPIKE
FAIRFIELD, CT 064322

SUPREME COURT OF THE STATE OF NEW YORK **(46)**
COUNTY OF NEW YORK **(69-75) (2-4, 46-69)**

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949

SUMMONS WITH NOTICE
Jury Trial Requested

Dated:
Coral Springs, Florida
December 12, 1996

Plaintiff Pro Se
John V. Kliebert
3800 Coral Springs Drive
Coral Springs, Florida 33065
954.796.9029

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN V. KLIEBERT,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949

SUMMONS WITH NOTICE
Jury Trial Requested

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the plaintiff within 20 days after the service of this summons, exclusive of the day of service of this summons, or 30 days after the service is complete if this summons is not personally delivered to you within the State of New York; and in case of your failure to answer, judgment will be taken against you bay default for the relief demanded herein.

NOTICE: The nature of this action is to recover damages against defendants for causes of action on behalf of GENERAL ELECTRIC COMPANY, INCORPORATED, KIDDER PEABODY GROUP, INCORPORATED, KIDDER PEABODY & COMPANY, INCORPORATED, EDWARD A. CERULLO, RICHARD

LAFERGOLA and JOEL "JJ" MCKOAN, and JOHN & JANE DOEs 1-25 for prima facie tort, invasion of privacy, conversion, breach of fiduciary duty, breach of contract, false arrest and imprisonment, malicious prosecution, abuse of process, conspiracy, defamation, violation of US Constitutional freedoms of association and speech, intentional infliction of emotional distress.

THE RELIEF SOUGHT: is special damages of at least $20,671.00 dollars, general (compensatory) damages of at least $25 million dollars, and punitive (exemplary) damages of at least $100 million dollars.

PLAINTIFF DESIGNATES New York County as the place of trial. The basis of venue is plaintiffs residence during the occurrence of the acts complained of. Plaintiff was then a resident of the County and State of New York.

UPON YOUR FAILURE to answer, judgment will be taken against you by default for the sum of $125,020,671.00 dollars plus the costs and disbursements of this action.

Dated:
Coral Springs, Florida
December 12, 1996

Plaintiff Pro Se
John V. Kliebert
3800 Coral Springs Drive
Coral Springs, Florida 33065
954.796.9029

RIDER:

Defendants' addresses:

GENERAL ELECTRIC COMPANY, INCORPORATED
3135 Easton Turnpike
Fairfield, CT 06431

KIDDER PEABODY GROUP, INCORPORATED
10 Hanover Square
New York, New York 10005

KIDDER PEABODY & COMPANY, INCORPORATED
10 Hanover Square
New York New York 10005

EDWARD A. CERULLO
2 Montague Terrace
Brooklyn, New York 10032

RICHARD LAFERGOLA
90 Washington Street
New York, New York 10006

JOEL "JJ" MCKOAN
1285 Avenue of the Americas
New York, New York 10020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN V. KLIEBERT

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants.

Index No. 96/121949

COMPLAINT

Jury Trial Requested

Plaintiff, John V. Kliebert, alleges as follows:

1. That at all times hereinafter mentioned the plaintiff, John V. Kliebert, was a resident of the City, County and State of New York and plaintiff is now a resident in the City of Coral Springs, the County of Broward, and the State of Florida.

2. That at all times hereinafter mentioned, General Electric Company, Incorporated (hereinafter "General Electric"), was and is a domestic and/or foreign corporation with its principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06431 and defendant General Electric, until and prior to January 1995, and exact date known

by the defendant, was the parent corporation and 100% owner, operator and controller of defendants Kidder Peabody Group, Incorporated and Kidder Peabody & Company, Incorporated.

3. That at all times hereinafter mentioned and prior to January 1995, the exact date known by the defendant, Kidder Peabody Group, Incorporated (hereinafter "Kidder Group"), was a domestic and/or foreign corporation with its principal place of business located at 10 Hanover Square, New York, New York 10005 and defendant Kidder Group was the parent and 100% owner, operator and controller of defendant Kidder Peabody & Company, Incorporated.

4. That prior and heretofore and until approximately April 26, 1993, the plaintiff was employed by the defendant Kidder Peabody & Company, Incorporated (hereinafter "Kidder"), a domestic and/or foreign corporation located at 10 Hanover Square, New York, New York 10005.

5. That at all times herein mentioned, the defendant, Edward A. Cerullo (hereinafter "Cerullo") was and is a resident of the State of New York and, until approximately June 1994, the exact date known to this defendant, Cerullo was an employee of defendant Kidder.

6. That at all times herein mentioned, the defendant, Richard Lafergola, (hereinafter "Lafergola") was and is a resident of the State of New Jersey and, until approximately January 1995, the exact date known to the defendant, Lafergola was an employee of defendant Kidder.

7. That at all times herein mentioned, the defendant, Joel "JJ" McKoan (hereinafter "McKoan") was and is a resident of the State of New York and, until and prior to approximately January 1995, the exact date known to the defendant, McKoan was an employee of defendant Kidder.

8. That prior to April 1993 and again during December 1993, defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola and McKoan learned of plaintiffs inquiries and investigations into, and complaints about defendants activities violating customer contracts, breaching fiduciary duties to customers, and violations of securities laws by defendants General Electric, Kidder Group and Kidder regarding the trading of, financing of, processing of, and record keeping of cash and securities including United States Government STRIPS, United States Government Mortgage securities and Whole Loans.

9. That starting on or about September 23, 1993 and continuing through approximately April 1994 defendants General Electric, Kidder Group and Kidder increased the number of acts violating customer contracts, breaching fiduciary duties owed customers, and violating securities laws as outlined heretofore and coerced and threatened employees who brought those violations to their attention. That during said period defendants shadowed, followed, surviellled and investigated persons having or perceived as having knowledge of their improper activities.

10. That defendants Kidder Group, Kidder, and Cerullo had a history of securities law violations involving the trading of, financing of, processing of, and record keeping of United States Government securities. That defendant Lafergola has a history of using cocaine.

11. That General Electric has a history of conviction of fraud against the Government and the People of the United States.

12. That General Electric, Kidder Group, Kidder, and Cerullo hac a history of taking punitive and retaliatory actions

against employees of said defendants who were knowledgeable of and critical of their practices concerning the trading, financing, processing and record keeping of United States Government Securities. Further, Cerullo had a history of taking punitive and retaliatory actions against persons based solely on spite, ill-will or personal dislike. Included among these persons is plaintiff, and among others, Linda La Prade.

13. In April 1994 General Electric publicly revealed a scandal where an employee Joseph Orlando Jett ("Jett") was alleged to have created bogus trades and phoney profits from United States Government STRIPS trading and subsequently sold Kidder at a loss of One Billion $1,000,000,000.00) Dollars approximately. Jett has alleged that his trading in United States Government STRIPS was known to and at the direction of his superiors at defendant Kidder including defendant Cerullo.

14. That after obtaining the knowledge alleged in paragraph "8" above, defendants General Electric, Kidder Group, Kidder and Cerullo by themselves and/or through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, including Cerullo, Lafergola and McKoan, acting within the scope of their employment and of their authority, without justification or privilege and solely with intent to harm the plaintiff, thereupon determined and decided to conduct a campaign of harassment and intimidation, maligning and otherwise severely injuring plaintiff, to suppress plaintiff's investigation of and prevent his disclosure of information about violation of securities laws by defendants General Electric, Kidder Group and Kidder activities engaged in under General Electric`s business objective of "profits at any cost" and said campaign was executed with extraordinary vindictiveness, spite, ill-will and malice.

15. The cost of said campaign was in excess of One Million ($1,000,000.00) Dollars.

AS FOR A 1st CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER
and
JOHN & JANE DOEs 1-25

16. That the defendants General Electric, Kidder Group, and Kidder by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, between April 1993 and the present time, without plaintiff's consent, express or implied, engaged in certain actions and activities constituting a campaign of harassment and intimidation specifically directed at plaintiff, including, among other things,:

(a) Defendants agents starting in late 1993 engaged in a course of conduct where they agreed and decided among themselves to have the plaintiff murdered and agents of the defendants having admitted that 'the top lawyer running this thing told us to kill you'.

(b) In furtherance of the course of conduct set forth in 16 (a), defendants solicited, requested, commanded, importuned or otherwise attempted to cause certain of their agents, servants and employees kill the plaintiff. That agents of defendants told plaintiff that defendants has asked said agents to kill the plaintiff.

(c) Defendants, their agents, servants and/or employees overheard, intercepted, accessed and recorded plaintiffs conversations by unlawful wiretapping and the use of

mechanical and electronic devices and through false representation.

(d) Defendants with intent to harass, annoy or alarm plaintiff followed plaintiff in and about public places and repeatedly committed acts which alarmed and seriously annoyed the plaintiff and served no legitimate purpose. That said tailing and interference with plaintiff's movements and associations was conducted in a manner calculated to and which did harass, intimidate, defame, isolate and terrorize plaintiff and evidenced a total disregard for his personal safety. That the aforesaid actions and activities engaged in by defendants included but are not limited to the following:

(1) Plaintiff was hounded, chased, pursued and followed by agents employed by defendants starting in December 1993 and ending in April or June 1994. These agents followed him on foot, by motor vehicle, by New York City subway, vehicles for hire, and airplanes.
Defendants' agents directly followed, tailed and shadowed plaintiff in and near his homes, on highways, into gas stations, stores, restaurants, museums, churches, into airports, airplanes, hotels, banks, ATM machines, onto subway platforms, into subway cars, into restrooms, parks, and into buildings and other places all of which were accomplished by unreasonable means for an unreasonable length of time and without any legitimate or justifiable purpose, and all of which constituted obtrusive surveillance of such an extreme degree as to be outrageous, oppressive and malicious.

(2) That between December 1993 and February 1994 said tailing and interference with plaintiff's movement and associations was conducted continuously and on a 24 hour a day basis without interruption or pause. That at all times plaintiff was followed, pursued, hounded and surrounded by packs of agents 4 to 8 in number who were armed and believed to have taken human life.

(3) That between March 1994 and April 1994 said tailing and interference with plaintiff's movement and associations was conducted continuously and on a 24 hour a day basis without interruption or pause for various periods of time. That during these periods of time plaintiff was followed, pursued, hounded and surrounded by packs of agents 4 to 8 in number who were armed and believed to have taken human life.

(4) That defendants' agents dashed in front of and at plaintiff in a threatening manner, confronting plaintiff at extremely close range, stepping and charging into the path of plaintiff and impending thereby his lawful movement with their persons and automobiles; suddenly
jumping out and charging at plaintiff from cars, buildings and other concealed places; touching the person of plaintiff without his specific consent or request, walking closely behind, beside or in front of plaintiff on public streets and places; running after and chasing plaintiff into oncoming street traffic, down streets, down flights of stairs, onto subway platforms and into oncoming trains.

(5) Defendants' agents blocked, obstructed and interfered with plaintiff's access, entry, movement and egress to streets, buildings and other public places.

(6) When plaintiff walked rapidly, defendants agents, servants and/or employees ordered plaintiff to "Walk slower or I'll put a bullet in your leg".

(7) Defendants' agents surrounded and chased plaintiff in motor vehicles on public highways in New York State at speeds in excess of 55 miles an hour, following at under distances of less that 1 car length and forcing plaintiff's vehicle off the road.

(8) Defendants' agents, servants, and/or employees blocked, obstructed and interfered with plaintiff's access to and egress from cabs and livery service vehicles.

(9) Defendants' agents, servants, and/or employees took photographs of, and made daily written notes of and made sound recordings of plaintiff's conversations in and outside his homes.

(10) That for the period between December 1993 through February 1994 and April 1994 this following and interference with plaintiff's movements and associations was overt and visible to passersby at all times. The aforesaid actions caused passersby to stop and stare at plaintiff and make comments to plaintiff causing embarrassment and torment.

17. That the aforesaid acts and activities of said defendants were intended solely to harm the plaintiff. That the aforesaid acts and activities of defendants by themselves, in conjunction with all of the allegations in this complaint, and as part of a One Million ($1,000,000.00) Dollar campaign to harass, intimidate, defame, isolate and terrorize plaintiff, constituted extreme, outrageous, atrocious and utterly intolerable conduct, beyond the common standards of human decency, which intentionally and recklessly, or with reasonable foreseeability, caused severe financial harm and severe emotional harm to plaintiff. That because of the foregoing wrongful acts and activities of defendants, and the consequences therefrom, specifically designed to flout the law, the plaintiff was made to suffer large legal expenses, large medical expenses, loss of self-esteem, loss of self-confidence, loss of sleep, ridicule, embarrassment, vexation, humiliation, mental distress, anxiety, damage to his good name and reputation, and ever-present fear for his life, safety and promise, the lives, safety and promise of his family members and the lives, safety and promise of all persons viewed as having information supporting his complaints, and injury to a property interest inherent and inextricably woven plaintiff's personality and good name. That said acts and activities interfered with plaintiff's right to physical health and well being and to be free from emotional distress and mental anguish, and caused plaintiff to be in the fear of the continuation of said wrongful acts without any limitation in scope, or restriction of law, as well as to their extension to more violent means of intimidation and harassment, including murder, all from unidentified sources and, therefore, completely beyond the power of the plaintiff to cope with. That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00. In addition to these special damages, plaintiff has suffered general (compensatory) damages of Twenty-five Million ($25,000,000.00) Dollars. That such acts and activities were vindictive, oppressive, malicious, outrageous,

willful, wanton, reckless and abusive, so as to entitle plaintiff to punitive or exemplary damages in the amount of One Hundred Million ($100,000,000.00) Dollars.

18. Plaintiff claims for general or compensatory damages and punitive or exemplary damages for prima facie tort as a case of first impression.

19. That plaintiff explicitly makes these claims under the laws of the State of New York and relies upon the Court to apply any and all protections that may be guaranteed or afforded to him by common law of this State, the State constitution, and any and all protections that may be guaranteed or afforded him by the Constitution of the United States and federal law.

20. Plaintiff requests trial by jury on this cause of action, and to have triable issues of disputed fact and disputed inferences which can be drawn from undisputed facts decided by said jury as provided by law and the constitution of the State of New York.

AS FOR A 2nd CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
and
JOHN & JANE DOEs 1-25

21. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "20" inclusive, as if specifically pleaded herein at length.

22. That the defendants General Electric, Kidder

Group, Kidder, and Cerullo by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, on or about December 16, 1993 engaged in an actions and activities constituting this cause of action for prima facie tort when, as part of a campaign of harassment and intimidation, specifically directed at plaintiff,

(a) Defendants General Electric, Kidder Group, Kidder, and Cerullo intentionally engaged in conduct designed to specifically harm plaintiff by forcing him to defend a spurious misdemeanor complaint when they directed defendants Lafergola and McKoan to make statements in the misdemeanor complaint which they knew to be false when made and without any basis in fact or law and directed defendants Lafergola and McKoan to make statements which they knew to be false and affix their signatures to a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable, they ordered, commanded, solicited, requested, importuned and otherwise directed said defendants to utter and sign statements annexed hereto as exhibits A, B, and C.

(b) Defendants General Electric, Kidder Group, Kidder, andCerullo coerced defendants Lafergola and McKoan compelling or inducing them to engage in conduct which they had a legal right to abstain from engaging in, namely the making of false statements to the New York County District Attorney in the within misdemeanor proceeding, thereby instigating and initiating said proceeding, and affixing their signatures to affidavits, and they forced and coerced, and continue to force and coerce Lafergola and McKoan from coming forward and telling the truth about plaintiff. The threats

directed against Lafergola and McKoan concerned their continued employment, salary and bonus levels.

(c) That defendant Lafergola has publicly admitted to witnesses that the statements attributed to him in the misdemeanor complaint are false, that they were composed by the corporate defendants, that prior to making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that Lafergola denied repeatedly that these words were said by plaintiff or that anything threatening was said by the plaintiff in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, Lafergola has stated to witnesses that Cerullo told him not to be concerned about making such false statements owing to the defendants' influence in the District Attorney's Office.

(d) That the words complained of by defendant Lafergola and first spoken by defendant Cerullo and other defendants and printed in the misdemeanor complaint:

". . . defendant had a list of people he wanted to get even with and that he had purchased a shotgun and four shells . . . defendant was going to go [to] the Kidder trading floor disguise himself as a messenger carrying long stem roses or a golf bag and get Sean Farrell, Tom Egan, Brian Finkelstein and Joel McKoan . . . ."

(e) That the words complained of by defendant McKoan and as first spoken by the other defendants and printed in the misdemeanor complaint:

". . . defendant had a list of people he wanted to

eliminate and that after pointing to McKoan's chest, stated . . . that Mr. McKoan's shirt would look good with a red splotch in the chest area."

23. Further, the meeting between McKoan and plaintiff where defendants allege the words complained about were spoken was initiated by McKoan and witnessed by John M. Liftin head legal counsel for defendants Kidder Group and Kidder who was accompanying McKoan at that time and occurred on a public thoroughfare opposite 56 Beaver Street at 2:00 in the afternoon, approximately. McKoan having interrupted plaintiff's travel, initiated and maintained a conversation lasting approximately 20 minutes. The tone of said conversation was friendly and jocular. After said conversation plaintiff continued his travel and met with Donald Clark ("Clark"), a Kidder officer, confirming and arranging with Clark a further meeting with Lafergola and others that afternoon. Said meeting with Clark was prearranged for 2:00 pm and occurred at approximately 2:20, plaintiff having been delayed by McKoan and Liftin.

24. That the aforesaid acts and activities of said defendants were intended solely to harm the plaintiff. That the aforesaid acts and activities of defendants by themselves, in conjunction with all of the allegations in this complaint, and as part of a One Million ($1,000,00.00) Dollar campaign to harass, intimidate, defame, isolate and terrorize plaintiff, constituted extreme, outrageous, atrocious and utterly intolerable conduct, beyond the common standards of human decency, which intentionally and recklessly, or with reasonable foreseeability, caused severe financial harm and emotional harm to plaintiff. That because of the foregoing wrongful acts and activities of all defendants, and the consequences therefrom, specifically designed to flout the law, the plaintiff was incarcerated and made to suffer the terrifying specter of imprisonment of up to six months in the New York

penal system, the threat of disenfranchisement of rights and privileges afforded a United States citizen, large legal expenses, large medical expenses, fine, penalty and interest expenses, loss of self-esteem, loss of self-confidence, loss of sleep, ridicule, embarrassment, vexation, humiliation, mental distress, anxiety, damage to his good name & reputation, and ever-present fear for his life, safety and promise, the lives, safety and promise of his family members and the lives, safety and promise of all persons viewed as having information supporting his complaints, and injury to a property interest inherent and inextricably woven in plaintiff's personality and good name. That said acts and activities interfered with plaintiff's right to physical health and well being and to be free from emotional distress and mental anguish, and caused plaintiff to be in the fear of the continuation of said wrongful acts without any limitation in scope or restriction of law, from identified sources of the People of the State of New York as well as to their extension to more violent means of intimidation and harassment, including murder, all from unidentified agents and sources of defendants and, therefore, completely beyond the power of the plaintiff cope with. That said acts caused plaintiff expenses to defend himself against prosecution of $3, 750.00 and medical expenses of $7,950.00. In addition to these special damages has suffered general (compensatory) damages of Twenty-five Million ($25,000,000.00). That such acts and activities were vindictive, oppressive, malicious, outrageous, willful, wanton, reckless and abusive, so as to entitle plaintiff to punitive or exemplary damages in the amount of One Hundred Million ($100,000,000) Dollars.

25. Plaintiff claims for general or compensatory damages and punitive or exemplary damages for prima facie tort as a case of first impression.

26. That plaintiff explicitly makes these claims under the laws of the State of New York and relies upon the

Court to apply any and all protections that may be guaranteed or afforded to him by common law of this State, the State constitution, and any and all protections that may be guaranteed or afforded him by the Constitution of the United States and federal law.

27. Plaintiff requests trial by jury on this cause of action, and to have triable issues of disputed fact and disputed inferences which can be drawn from undisputed facts decided by said jury as provided by law and the constitution of the State of New York.

AS FOR A 3rd CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST DEFENDANTS
LAFERGOLA AND MCKOAN

28. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "27" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 24 through paragraph 27 as if specifically pleaded herein at length.

29. That the defendants Lagergola and McKoan acting within the scope of their employment, on or about December 16, 1993 engaged in actions and activities constituting this cause of action for prima facie tort when, as part of a campaign of harassment and intimidation specifically directed against plaintiff, these defendants willfully, wantonly, and recklessly made statements which they knew to be false and affixed their signatures to a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable, instigating, initiating and commencing a misdemeanor action against plaintiff (annexed exhibits A, B, and C).

AS FOR A 4th CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
LAFERGOLA AND MCKOAN
and
JOHN & JANE DOEs 1-25

30. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "29" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action pargrapgh 24 through paragraph 27 as if specifically pleaded herein at length.

31. That defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola and McKoan by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, on or about December 16, 1993 engaged in actions and activities constituting this cause of action for prima facie tort when, as part of a campaign of harassment and intimidation, specifically directed at plaintiff defendants engaged in a conspiracy when, with intent that defendants Lafergola and McKoan make false statements concerning plaintiff's conversations with them on November 30, 1993 and December 1, 1993, respectively, and to cast otherwise truthful statements in a false light, they agreed with and among themselves and planned and participated in the conception of these false statements, first uttering these words to and among themselves, and aided, encouraged, abetted and helped defendants Lafergola and McKoan in uttering these words and later and affixing their signatures to papers putting these words into print (annexed exhibits A, B, and C).

AS FOR 5th CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER,
and
JOHN & JANE DOEs 1-25

32. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "31" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically pleaded herein at length and adding to the sentence in paragrapgh 17 that reads "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00." the words "and damages of $6,511.00."

33. That the defendants General Electric, Kidder Group, and Kidder by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, between April 1993 and the present time, without plaintiff's consent, express or implied, engaged in certain actions and activities constituting a campaign of harassment and intimidation specifically directed at plaintiff, including, among other things,:

(a) Defendants engaged in conduct specifically directed against the plaintiff and designed to cause him damage when with intent of damaging plaintiff's personal property, and having no right to do so nor any reasonable ground to believe that they had such right, they willfully damaged property of plaintiff in an amount exceeding one thousand five hundred dollars. Specifically, defendants prevented plaintiff form removing his personal possessions from his place of employment at 60 Broad Street, New York, New York upon

the termination of his employment. Included among those possessions were four (4)computers which were plaintiff's private property containing software and personal files belonging to defendant and accumulated over several years. These files were encoded with pass words to prevent unauthorized access. Defendants accessed, copied, and destroyed said personal files and software.

(b) Defendants engaged in conduct specifically directed against plaintiff when, having no right to do so nor any reasonable ground to believe that they had such right, they tampered with plaintiff's computers with intent to cause substantial inconvenience to plaintiff in an amount exceeding two hundred fifty dollars.

(c) Defendants engaged in conduct specifically directed against plaintiff when they tampered, trespassed, accessed, interfered with and unauthorizedly used plaintiff's computers and having no right to do so they intentionally gained access to plaintiff's computers and destroyed plaintiff s computers so as to cause damage to plaintiff in an aggregated amount exceeding three thousand dollars.

(d) That plaintiff's counsel presented to defendants demands itemizing the cost of damages as $1,122.00 for replacement of destroyed computer software, $1,959.00 for destroyed and damaged computer hardware, $3,500 for reconstructing personal files and data. Defendants refused, ignored or neglected plaintiff's counsel's demands.

AS FOR 6th CAUSE OF ACTION
FOR PRIMA FACIE TORT
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER,
and
JOHN & JANE DOEs 1-25

34. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "33" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically pleaded herein at length and adding to the sentence in paragraph 17 that reads "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00." the words "and fine, penalty and interest of an amount to be determined."

35. That the defendants General Electric, Kidder Group, and Kidder by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, between April 1993 and the present time, without plaintiff's consent, express or implied, engaged in certain actions and activities constituting a campaign of harassment and intimidation specifically directed at plaintiff, including, among other things, defendants tampered with plaintiff's private communications when knowing that they did not have the consent of the senders or the plaintiff, they opened and/or read sealed letters or other sealed private communications.

36. That plaintiff received his personal mail at Kidder's address of 60 Broad Street, New York, New York and 10 Hanover Square, New York, New York for the 11 years that he was employed by defendant. Defendants by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, had such knowledge. After his dismissal in April 1993, plaintiff and plaintiff's counsel repeatedly requested Kidder to return and forward said mail to him or his counsel. That this mail included, among other things, monthly, quarterly and other periodic statements of account from plaintiffs savings accounts

at Chemical Bank, the Reserve Fund, his Kidder Peabody Premium Account, his 401K account with defendants, his charge accounts with American Express and Citibank Visa, retirement, benefit, and pension accounts managed by defendants, his 1993 W2, and 1020 statements for said Kidder Peabody Premium Account.

37. That defendants have never forwarded him such mail nor, in cases where they exercised control, provided him with duplicates and said conduct was a result of a specific plan and or scheme conceived and executed by defendants to deprive plaintiff of important critical information so as to annoy, harass and intimidate plaintiff and cause him financial harm and emotional harm.

AS AND FOR A 7th CAUSE OF ACTION
FOR INVASION OF PRIVACY
AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER
and
JOHN & JANE DOE'S 1-25

38. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "37" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as allegations for this cause of action all allegations set forth under the 5th and 6th causes of action in this complaint as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action pargrapghs 17 and 20 as if specifically pleaded herein at length.

39. That by these acts defendants invaded plaintiff's right to privacy as guaranteed by the Constitution of the United States.

AS AND FOR AN 8th CAUSE OF ACTION
FOR CONVERSION
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER
and
JOHN & JANE DOE'S 1-25

40. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "39" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically pleaded herein at length and adding to the sentence in paragraph 17 that reads "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00." the words "and damages in the amount of $6,511.00 for personal property converted or wrongfully detained, and fine, penalty and interest of an amount to be determined."

41. Commencing on or about April 1993 defendants General Electric, Kidder Group and Kidder without authority or permission exercised dominion and control over certain personal property owned by plaintiff but remaining in defendant's business premises at 60 Broad Street, New York, New York, defendants having first prevented plaintiff from removing said personal property. This personal property included, among other things, plaintiff's mail, correspondence, personal records and files; financial documents and 4 computers, monitors and keyboards which were owned by plaintiff and contained software and computer records which were the personal property of plaintiff. That said mail included among other things, monthly, quarterly and other periodic statements of account from plaintiff's savings accounts at Chemical Bank, the Reserve Fund, his Kidder Peabody Premium Account, his 401K account with

defendants, his charge accounts with American Express and Citibank Visa, retirement, benefit, and pension accounts managed by defendants, his 1993 W2, and 1020 statements for said Kidder Peabody Premium Account.

42. Plaintiff and his counsel made repeated written and oral requests for the return of said property and reimbursement for property damaged on defendants and their agents and attorneys but said requests were refused, ignored, or neglected.

43. That plaintiff's counsel presented to defendants demands itemizing the cost of damages as $1,122.00 for replacement of destroyed computer software, $1,959.00 for destroyed and damaged computer hardware, $3,500 for constructing personal files and data.

AS AND FOR A 9th CAUSE OF ACTION
FOR BREACH OF FIDUCIARY DUTY
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER
and
JOHN & JANE DOE'S 1-25

44. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "43" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically pleaded herein at length and adding to the sentence in paragraph 17 that reads "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00." the words "and damages and fine, penalty and interest of an amount to be determined."

45. That plaintiff had been employed as a salesman by

defendants General Electric, Kidder Group and Kidder for approximately 11 years prior to his discharge from Kidder in April 1993 and had a duty to supply plaintiff with timely W2s.

46. That plaintiff had a 401K with $73,649.81 of plaintiff's money and other pensions and accounts with defendants General Electric, Kidder Group and Kidder who were the trustees and/or fiduciaries of said pensions and accounts and had a duty under ERISA and other applicable laws to supply plaintiff with timely statements. That included in these statements were periodic statements of performance and activity, annual performance results, annual performance results of available investments alternatives, annual election forms for changing and switching among available investments alternatives.

47. That plaintiff had a Kidder Peabody Premium Account which was numbered 10MIF735143 containing $16,754.20 of plaintiff's money with defendants General Electric, Kidder Group and Kidder who were the trustees and/or fiduciaries of said account and had a duty under applicable security, banking, investment and other law to supply plaintiff with timely statements. That said statements included monthly statements of performance and activity, annual performance results and an annual I.R.S. 1020.

48. That plaintiff was entitled to an extension and or coverage from the health insurance that defendants maintained covering plaintiff after he was terminated pursuant to Cobra rules and regulations. That defendants General Electric, Kidder Group and Kidder had a duty and obligation under Cobra to provide plaintiff with brochures and other statements detailing the limits and extent of coverage under Cobra.

49. That plaintiff was entitled to return of expense forms and receipts submitted for reimbursement but ignored,

neglected or refused by defendants General Electric, Kidder Group and Kidder after he was terminated by defendants.

50. That defendants General Electric, Kidder Group and Kidder failed to provide plaintiff with a W2 for 1993 until 1995 and have never provided periodic statements of performance and activity, annual performance results, annual performance results of available investments alternatives, or annual election forms for changing and switching among available investments alternatives pertaining to his 401K for 1993, 1994; failed to provide annual vested retirement and pensions statements for 1993, 1994, 1995; failed to provide plaintiff with instructions and forms to activate Cobra coverage and failed to provide instructions and forms to make insurance claims under Cobra for 1993, 1994, 1995; failed to provide I.R.S. 1020 forms for 1993 and 1994 and monthly statements from April 1993 through May 1994 for plaintiff's Kidder Peabody Premium Account; failed to provide unreimbursed expense forms and receipts submitted in 1994.

51. That all said failures were before and after repeated requests by both plaintiff and his attorney.

AS AND FOR A 10th CAUSE OF ACTION
FOR BREACH OF FIDUCIARY DUTY and BREACH OF IMPLIED CONTRACT
AGAINST DEFENDANT
GENERAL ELECTRIC
and
JOHN & JANE DOE'S 1-25

52. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "51" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically

pleaded herein at length and deleting in paragraph 17 from the second sentence the words "by themselves".

53. That commencing on your about January 1994 and continuing to the present plaintiff was and is a registered owner of General Electric stock. That as an owner of record, defendant is required under law to provide plaintiff with reports of annual performance, notification of annual meetings, and proxy statements, among other things.

54. That commencing in 1995 and continuing to the present defendant General Electric has refused, neglected or ignored its duty to provide plaintiff with said materials and said failure continues after repeated requests from plaintiff for such materials.

AS AND FOR A 11th CAUSE OF ACTION
FOR BREACH OF CONTRACT
AGAINST DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER
and
JOHN & JANE DOE'S 1-25

55. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "54" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraph 17 through paragraph 20 as if specifically pleaded herein at length and replacing the sentence in paragraph 17 that reads "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $7,950.00." with the sentence "That said acts caused plaintiff legal expenses of $1,750.00 and medical expenses of $3,600.00 and damages in the amount of $4,350.00.

56. That in or around December 1993, one of defendants' attorneys, Joel M. Miller, Esq., of Miller and Wrubel, Esqs., in a telephone conversation with plaintiff's counsel, Donald Rosenkrantz, P.C. offered to pay for or reimburse plaintiff for psychiatric expenses and Donald Rosenkrantz, P.C. accepted said offer.

57. Both Joel M. Miller, Esq. and Donald Rosenkrantz, P.C. were authorized by their principals, defendants, General Electric, Kidder Group and Kidder and plaintiff to respectively offer and accept such a proposal.

58. Defendants General Electric, Kidder Group and Kidder's offer was not limited by time, the number of treatments or the price of said treatment.

59. As a result of defendants General Electric, Kidder Group and Kidder's offer and plaintiff's acceptance and plaintiff's use of said services in reliance of such offer which was the consideration for said offer, the parties entered into an oral contract.

60. Plaintiff has satisfied all the terms and conditions of said contract, and demanded payment through his attorney but defendants General Electric, Kidder Group and Kidder breached said contract by refusing reimbursement.

AS FOR A 12th CAUSE OF ACTION
FOR FALSE ARREST AND FALSE IMPRISONMENT
Under 42 USCS 1983, 42 USCS 1985 and the guarantees of the Constitution of the United States
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO, LAFERGOLA AND MCKOAN
and

JOHN AND JANE DOEs 1-25

61. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "60" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24 and 27 as if specifically pleaded herein at length.

62. That on or about December 16, 1993, defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola, McKoan and John and Jane Does 1-25 by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, ordered, commanded, solicited, requested, or importuned representatives in the New York County District Attorney's office to arrest, imprison and prosecute the plaintiff. That defendants Lafergola and McKoan made statements to representatives of the Special Prosecutions Section of the New York County District Attorney's office which comprise all the allegations against the plaintiff for which the plaintiff was arrested, imprisoned, and prosecuted. That said words are contained in the misdemeanor complaint filed under docket number 3N100223 with the Criminal Court of the City of New York, County of New York and annexed hereto as exhibit A.

63. That the words complained of by defendant Lafergola and first spoken by other defendants and later printed in the misdemeanor complaint:

". . . defendant had a list of people he wanted to get even with and that he had purchased a shotgun and four shells . . . defendant was going to go [to] the Kidder trading floor disguise himself as a messenger carrying long stem roses or a

golf bag and get Sean Farrell, Tom Egan, Brian Finkelstein and Joel McKoan . . . ."

64. That the words complained of by defendant McKoan and as first spoken by other defendants and later printed in the misdemeanor complaint:

". . . defendant had a list of people he wanted to eliminate . . "

65. Further, defendants willfully, wantonly and maliciously combined these false statements with the one truthful statement in the complaint in order to cast that statement in a false light.

66. That said statement, truthful to the fact that those words or approximately similar words were spoken, but not to the false inferences that were intended to be drawn, were:

". . . and that after pointing to McKoan's chest, stated . . . that Mr. McKoan's shirt would look good with a red splotch in the chest area."

67. That defendants General Electric, Kidder Group, Kidder, Cerullo, and John and Jane Does 1-25 composed and first spoke these words and knew that these words were false. Defendants having composed and first spoken these false words among themselves, decided and agreed among themselves that defendants Lafergola and McKoan would deliver these false words along with other words to their servants in the New York County District Attorney's office. The purpose of this was to have these words infer other than their intended meaning.

68. That by these orders and false statements defendants intended to falsely imprison plaintiff, and plaintiff was imprisoned by defendants' servants in the New York County

District Attorney's office; plaintiff was conscious of such imprisonment; that plaintiff did not consent to imprisonment and defendants had no privilege, justification, or immunity to make false statements or to order, command, solicit, request, importune or otherwise attempt the arrest and imprisonment of plaintiff by their servants in the New York County District Attorney's office; plaintiff was conscious of said imprisonment and did not consent to said imprisonment; and said imprisonment was without privilege.

69. That the actions of the defendants were intended to deprive plaintiff of any trust, security, and protection that he might have had in his recourse to the protection of law and due process, and defendants' actions did deprive plaintiff of any trust, security, and assurance that he might have had in his recourse to the protection of law and due process.

70. That the aforesaid actions of defendants and the actions of the New York County District Attorney and his representatives to arrest, imprison and prosecute plaintiff are so inextricably intertwined and inseparable such that the arrest, imprisonment, and prosecution on the charges and allegations in the misdemeanor complaint would have been impossible without them.

71. That the actions and activities stated within this cause of action of the defendants and their servants in the New York County District Attorney and his representatives were executed under the color of law and under the authority of the office of the New York County District Attorney and the laws of the State of New York. That the aforestated actions of the defendants and the New York County District Attorney were calculated to and did deprive plaintiff of liberty, property, due process and privacy as guaranteed by the Constitution of the United States under Article IV and Amendments 1,4,5,9,10

and 14, and plaintiff's civil rights under 42 USCS 1983 and 42 USCS 1985.

72. Further, that defendant Lafergola has publicly admitted to witnesses that the statements attributed to him in the misdemeanor complaint are false, that they were composed by the corporate defendants, that prior to making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that he, Lafergola, denied repeatedly that these words were said by plaintiff or that anything threatening was said by the plaintiff in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, Lafergola has stated to witnesses that Cerullo told him not to be concerned about making such false statements owing to the defendants' influence in the District Attorney's office.

73. Further, that the actions and activities by defendants stated herein and heretofore constitute fraud, perjury, suppression of evidence, obstruction of justice, duress, conspiracy, and bad faith. That defendants servants in the New York County District Attorney's office acted on compulsion and without any capability of exercising independent prosecutorial judgment and solely on the orders of the defendants and the false statements of the defendants.

74. Further, under New York law findings of probable cause and failure to establish a favorable termination - even a conviction after a judicial determination on the merits after trial - are overcome by evidence of fraud, perjury, suppression of evidence, obstruction of justice, duress, conspiracy, and bad faith.

75. That plaintiff explicitly makes these claims under the guarantees and protections afforded him by the

Constitution of the United States and federal law including but not limited to 42 USCS 1983 and 42 USCS 1985, and relies upon the Court to apply any and all protections that may be guaranteed or afforded to him by law, including but not limited to the laws of the State of New York, the common law of this State, and the State constitution.

AS FOR A 13th CAUSE OF ACTION
FOR MALICIOUS PROSECUTION
UNDER 42 USCS 1983, 42 USCS 1985 and the guarantees of the Constitution of the United States
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
LAFERGOLA AND MCKOAN
and
JOHN AND JANE DOEs 1-25

76. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "75" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the cause of action for false arrest and imprisonment paragraphs 61 through 75. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27, and 75 as if specifically pleaded herein at length.

77. That defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola, McKoan and John and Jane Does 1-25 initiated, instigated, procured and arranged the arrest, imprisonment and prosecution of the plaintiff by ordering, commanding, soliciting, requesting, importuning and otherwise attempting to compel the New York County District Attorney's office to arrest, imprison and prosecute the plaintiff solely on the basis of their false statements. Defendants' actions were without probable cause, privilege, justification, or basis in

fact or law and were maliciously enacted for the sole purpose of harming the plaintiff, said actions were maintained and continued due to defendants' willful and wanton failure to come forth during the misdemeanor proceedings with the truth, and the proceedings against plaintiff were terminated in his favor after a judicial determination involving the merits.

AS FOR A 14th CAUSE OF ACTION
INVASION OF PRIVACY
Under 42 USCS 1983, 42 USCS 1985 and the guarantees of the Constitution of the United States
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
LAFERGOLA AND MCKOAN
and
JOHN AND JANE DOEs 1-25

78. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "77" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the causes of action for false arrest and imprisonment and malicious prosecution paragraphs 61 through 77. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27, and 75 as if specifically pleaded herein at length and adding to sentence in paragraph 24 reading "That said acts caused plaintiff legal expenses of 3,750.00 and medical expenses of $7,950.00." the words "and damages for the value of the items converted of $710.00".

79. Further, on or about December 16, 1993, defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola, McKoan and John and Jane Does 1-25 by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting

within the scope of their employment, under the color of law and with intent to deprive plaintiff of his privacy, liberty, property and due process, ordered, commanded, solicited, requested, or importuned representatives in the New York County District Attorney's office, to enter, intrude and invade the privacy of plaintiff's person, plaintiff's homes, plaintiff's motor vehicles and other property located in Kings and Suffolk Counties without legal warrant, probable cause or justification and to seize plaintiff's property.

80. That defendants representatives in the New York County District Attorney's office upon said order and direction by defendants did enter upon plaintiff's person and premises and without legal warrant, probable cause or justification and remove various personal property belonging to plaintiff including 2 compound hunting bows, arrows, an air gun for propelling paint, a bb gun, a single shot pump shotgun, and various papers including a check drawn to the New York Telephone Company.

81. That at no time was an accounting for items removed from plaintiff's person or property ever given. That plaintiff's attorney and plaintiff repeatedly demanded said accounting but said accounting was never made nor have any of the items seize been returned.

82. That the invasion and intrusion into the privacy of plaintiff's person, homes, vehicles and other property by defendants' servants in the New York County District Attorney's office was solely due to the aforementioned actions and activities of defendants constituting fraud, perjury, suppression of evidence and obstruction of justice. That defendants' servants in the New York District Attorney's office acted on compulsion and without independent prosecutorial judgment and solely on the orders and false statements of the defendants.

AS FOR A 15th CAUSE OF ACTION

FOR ABUSE OF PROCESS

Under 42 USCS 1983, USCS 1985 and the guarantees of the Constitution of the United States

AGAINST ALL DEFENDANTS

GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,

LAFERGOLA AND MCKOAN

and

JOHN AND JANE DOEs 1-25

83. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "82" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the causes of action for false arrest and imprisonment, malicious prosecution, and invasion of privacy paragraphs 61 through 82. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27 and 75 as if specifically pleaded herein at length and adding to the sentence in paragraph 24 reading "That said acts caused plaintiff legal expenses of 3,750.00 and medical expenses of $7,950.00." the words "and damages for the value of the items converted of $710.00".

84. That the intent of the defendants in the acts and activities undertaken by them and directed at the plaintiff and as described heretofore, was to initiate and maintain a course of action against plaintiff for other than its intended purpose. Defendants actions included the arrest, imprisonment, and malicious prosecution of the plaintiff as aforestated.Defendants misused normal legal procedures to do plaintiff harm and were without economic or social excuse or justification, seeking collateral advantage and corresponding detriment to plaintiff as aforestated and were wholly outside of legitimate process.

85. That the actions and activities by defendants stated heretofore constitute fraud, perjury, suppression of evidence, and obstruction of justice. That defendants servants in the New York County District Attorney's office acted on compulsion and without any capability of exercising independent prosecutorial judgment and solely on the basis of the orders and false statements of the defendants.

AS FOR A 16TH CAUSE OF ACTION
FOR CONSPIRACY
Under 42 USCS 1985
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
LAFERGOLA AND MCKOAN
and
JOHN AND JANE DOEs 1-25

86. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "85" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the causes of action for false arrest and imprisonment, malicious prosecution, invasion of privacy and abuse of process paragraphs 61 through 85. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27 and 75 as if specifically pleaded herein at length and adding to the sentence in paragraph 24 reading "That said acts caused plaintiff legal expenses of $3,750.00 and medical expenses of $7,950.00." the words "and damages for the value of the items converted of $710.00".

87. That defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola, McKoan and John and Jane Does 1-25 by themselves and through their duly authorized

attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, on or about December 16, 1993 engaged in actions and activities constituting this cause of action for conspiracy under USCS 1985 when, as part of a campaign of harassment and intimidation, specifically directed at plaintiff defendants engaged in a conspiracy when they agreed with and among themselves and planned and participated in the conception of false statements and statements cast in a false light as described heretofore and aided, encouraged, abetted and helped defendants Lafergola and McKoan in uttering these words and later and affixing their signatures to papers putting these words into print.

AS FOR A 17TH CAUSE OF ACTION
FOR DEFAMATION
Under 42 USCS 1983 and the guarantees of the Constitution of the United States
AGAINST ALL DEFENDANTS
GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,
LAFERGOLA AND MCKOAN
and
JOHN AND JANE

88. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "87" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27 and 75 as if specifically pleaded herein at length.

89. That on or about December 16, 1993, defendants General Electric, Kidder Group, Kidder, Cerullo, and John and Jane Does 1-25 by themselves and through their duly authorized attorneys, officers, agents, servants, employees,

members and representatives, acting within the scope of their employment, ordered, commanded, solicited, requested, or importuned defendants Lafergola and McKoan to speak certain words to other persons among which were representatives of the New York County District Attorney's office. That defendants General Electric, Kidder Group, Kidder, Cerullo, and John and Jane Does 1-25 composed the words complained of and first spoke these words to and among themselves, to others, and to and with defendants Lafergola and McKoan, and all defendants knew them to be false.

90. That the words complained of by defendant Lafergola and first spoken by other defendants and later published in the misdemeanor complaint and later published by various newspapers:

". . . defendant had a list of people he wanted to get even with and that he had purchased a shotgun and four shells . . . defendant was going to go [to] the Kidder trading floor disguise himself as a messenger carrying long stem roses or a golf bag and get Sean Farrell, Tom Egan, Brian Finkelstein and Joel McKoan . . . ."

91. That the words complained of by defendant McKoan and as first spoken by other defendants and later printed in the misdemeanor complaint and later published by various newspapers:

". . . defendant had a list of people he wanted to eliminate . . ."

92. Further, defendants willfully, wantonly and maliciously combined these false statements with the one truthful statement in the complaint in order to cast that statement in a false light.

93. That said statement, truthful to the fact that those words or approximately similar words were spoken, but not to the false inferences that were intended to be drawn when juxtaposed and combined with the words in paragraphs 91 and 90, were:

". . . and that after pointing to McKoan's chest, stated . . . that Mr. McKoan's shirt would look good with a red splotch in the chest area."

94. That on or about December 16, 1993, defendants General Electric, Kidder Group, Kidder, Cerullo, Lafergola, McKoan and John and Jane Does 1-25 by themselves and through their duly authorized attorneys, officers, agents, servants, employees, members and representatives, acting within the scope of their employment, ordered, commanded, solicited, requested, or importuned representatives in the New York County District Attorney's office to arrest, imprison, prosecute and publish the aformentioned combination of words in the misdemeanor complaint, and to speak, and broadcast the aforementioned combination of words.

95. That the words complained of in paragraphs 90 and 91 are slanderous per se as they impute crimes and acts of moral turpitude. Further, said words constitute libel per se after publication in the misdemeanor complaint (annexed exhibit A).

96. That the words complained of in paragraph 93 were willfully and wantonly combined with the words in paragraphs 90 and 91 so as to infer crimes and acts of moral turpitude and are slanderous per quod. Further, said words constitute libel per quod after publication in the misdemeanor complaint (annexed exhibit A).

97. That the aforesaid actions of defendants and the actions of the New York County District Attorney and his representatives to arrest, imprison and prosecute plaintiff and to publish and speak the words complained of herein are so inextricably intertwined and inseparable such that the arrest, imprisonment, and prosecution on the charges and allegations in the misdemeanor complaint and the uttering, publication, and broadcast of said words by representatives of the New York County District Attorney's office would have been impossible without them.

98. That the aforestated actions of defendants and the actions and activities of New York County District Attorney's office as put herein were calculated to and did deprive plaintiff of the property right inherent in a good name as guaranteed by Constitution of the United States and did so under the authority of the office of the New York County District Attorney and the color of law.

99. Further, that defendant Lafergola has publicly admitted to witnesses that the statements attributed to him in the misdemeanor complaint are false, that they were composed by the corporate defendants, that prior to making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that he, Lafergola, denied repeatedly that these words were said by plaintiff or that anything threatening was said by the plaintiff in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, Lafergola has stated to witnesses that Cerullo told him not to be concerned about making such false statements owing to the defendants' influence in the District Attorney's office.

AS FOR A 18TH CAUSE OF ACTION

FOR VIOLATION OF FREEDOM OF MOVEMENT, ASSOCIATION AND SPEECH

As guaranteed by the Constitution of the United States

AGAINST DEFENDANTS

GENERAL ELECTRIC, KIDDER GROUP, KIDDER

and

JOHN & JANE DOEs 1-25

100. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "99" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the first cause of action for prima facie tort paragraph 16. Plaintiff repeats here as damages and applicable consideration for this cause of action paragraphs 24, 27, and 75 as if specifically pleaded herein at length.

101. That said actions prevented and interfered with plaintiff right to freedom of movement, association and speech as guaranteed by the Constitution of the United States and said prevention and interference was without justification or privilege.

AS FOR A 19TH CAUSE OF ACTION

FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Under 42 USCS 1983 and the guarantees of the Constitution of the United States

AGAINST ALL DEFENDANTS

GENERAL ELECTRIC, KIDDER GROUP, KIDDER, CERULLO,

LAFERGOLA AND MCKOAN

and

JOHN AND JANE DOES 1-25

102. Plaintiff repeats, reiterates and realleges each and every allegation of paragraph "1" through "101" inclusive, and as if specifically pleaded herein at length. Plaintiff repeats as allegations for this cause of action allegations made under the causes of action for false arrest and imprisonment, malicious prosecution, invasion of privacy, abuse of process, conspiracy, and defamation paragraphs 61 through 99. Plaintiff repeats here as damages and applicable connsideration for this cause of action pargrapghs 24, 27 and 75 as if specifically pleaded herein at length.

103. That the aforesaid actions of defendants and the actions of the New York County District Attorney and his respresentatives to arrest, imprison, prosecute, defame plaintiff and to violate plaintiff's constitutionally guaranteed right to privacy are so inextricably intertwined and inseparable such that the arrest, imprisonment, and prosecution on the charges and allegations in the misdemeanor complaint and the uttering, publication, and broadcast of complained of words, and the invasion of plaintiff's person and property by representatives of the New York County District Attorney's office would have been impossible without them.

104. Said acts and activities were extreme, outrageous and beyond the common standards of human decency and were intended to and did cause severe emotional distress to plaintiff.

105. That the aforestated actions of defendants and the actions and activities of New York County District Attorney's office as put herein were calculated to and did deprive plaintiff of rights to liberty, happiness, and tranquility as guaranteed by the Constitution of the United States and did so under the authority of the office of the New York County District Attorney and the color of law.

CONCLUSION

WHEREFORE, plaintiff demands judgment on his first through nineteenth causes of action for special damages of at least Twenty Thousand Six Hundred Seventy-One ($20,671.00) Dollars, general (compensatory) damages of Twenty-five Million ($25,000,000.00) Dollars and punitive (exemplary) damages of One Hundred Million ($100,000,000.00) Dollars plus costs, disbursements and interest from April 27, 1993.

Dated: Coral Springs, Florida
December 12, 1996

JOHN V. KLIEBERT
3800 Coral Springs Drive
Coral Springs, Florida
954.796.9029

"s/ John V. Kliebert"
John V. Kliebert

Sworn to before me on December 12, 1996

COURT OF APPEALS STATE OF NEW YORK

----------X

JOHN V. KLIEBERT,

N.Y. County Index No.121949/96

Plaintiff-Appellant,

Affidavit In Support Of Motion For Permission To Appeal To The Court of Appeals As Of Right, Or, In The Alternative, Permission To Appeal; And Permission To Expand Record On Appeal

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants-Respondents.

----------X

Plaintiff-Appellant, Pro Se
John V. Kliebert
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Coral Springs, Florida 33065
954-346-9882

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COURT OF APPEALS STATE OF NEW YORK

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JOHN V. KLIEBERT,

N.Y. County Index No.121949/96

Plaintiff-Appellant,

Affidavit In Support Of Motion For Permission To Appeal To The Court of Appeals As Of Right, Or, In The Alternative, Permission To Appeal; And Permission To Expand Record On Appeal

-against-

GENERAL ELECTRIC COMPANY, INCORPORATED
KIDDER PEABODY GROUP, INCORPORATED
KIDDER PEABODY & COMPANY, INCORPORATED
EDWARD A. CERULLO,
RICHARD LAFERGOLA and JOEL "JJ" MCKOAN,
and JOHN & JANE DOEs 1-25

Defendants-Respondents.

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STATE OF FLORIDA

}ss.:

COUNTY OF BROWARD

JOHN V. KLIEBERT, being duly sworn, states:

I am the Plaintiff-Appellant ("Appellant") in the above captioned action. I am not an attorney and have no legal training. I appear here pro se. I submit this affidavit in support of my application (Motion) to the Court for appeal as a matter of right, or in the alternative, for permission to appeal.

INTRODUCTION, JURISDICTION AND ADDITIONAL RELIEF

This matter is before the Court owing to a decision of the Appellate Division First Department dated April 6, 2000 denying, among other things, Appellant's motion for reargument and for appeal to the Court as a matter of right, or in the alternative, for permission to appeal. Notice of Entry of said decision is dated April 7, 2000 and was served on Appellant by ordinary mail.

This application is for permission to appeal to this Court the June 3, 1998 Judgment ("Judgment") by the Hon. Robert D. Lippmann, the decisions orders and judgments preceeding said Judgment and alleged by Respondents as giving jurisdiction to said Judgment; the decisions, orders and judgments in Kliebert vs. McKoan, 643 N.Y.S.2d 114 (1st Dep't), lv. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996) ("McKoan") which are so inextricably with the instant case ("General Electric") so as to be inseparable and without which a full and fair hearing cannot be had; and the decisions, orders and judgments subsequent to the trial court's Judgment which also are so inextricably intertwined with the Judgment so as to be inseparable and without which a full and fair hearing cannot be had.

The proceedings under appeal here are unprecedented in New York law. Prior to the decisions in the instant case, no New York court has ever held proceedings to determine the exact dollar amount of an award of attorneys' fees against a pro se litigant and no New York court has ever made an award of attorneys' fees on a pro se litigant. This is a case of first impression and one of grave social importance owing to the chilling effect of the decisions have on the self-represented. Further, prior to the decisions in the instant case, no New York court has ever held proceedings to determine the exact dollar amount of an award of attorneys' fees nor has any New York court ever made an award of attorneys fees where the strict legal requirements of 22 N.Y.C.R.R. 130-1.2 have not been met; nor has any New York court retroactively applied the 1998

revision of 22 N.Y.C.R.R. 130-1.2 to awards of attorneys' fees made in 1997. These last 2 unprecedented acts by the courts also form a case of first impression and are of similar grave social importance owing to the chilling effect the decisions have on the self-represented as well as litigants represented by counsel. A fourth issue of grave social importance and of chilling effect on the self-represented is the unprecedented decision imposing injunction upon a pro se litigant where the pro se litigant is denied pursuit of litigation either with permission of the courts or with representation by counsel.

The above issues are argued under Appellant's Argument Point 1. Other claims constituting cases of first impression are made under Argument Points II, III, IV, & V and the Court is respectfully directed to those arguments. Defendants-Respondents ("Respondents") have demanded that courts below limit their review of the issues on appeal to the proceedings had before the trial court. Appellant would be denied a full and fair hearing on the issues of grave social importance raised here should the Court be directed by Respondents' demand. Acquiescence would deny Appellant his constitutional rights to substantial and procedural due process and to fair and equal treatment before the law.

As demonstrated here and in the arguments below, Appellant's application for appeal to this Court is warranted under the Court of Appeals Rules of Practice 22 N.Y.C.R.R. Chap. 500.11 (d) (1) (v), Appellant having demonstrated that the questions of law presented here are "[i] novel or [ii] of public importance, or [iii] involve conflict with prior decisions of this court, or [iv] that there are conflicts among the Appellate Divisions." All of these requirements are satisfied by the issues surrounding the 1998 decisions, orders and judgments of the trial court which determined the exact dollar amount of the 1997 award of attorneys' fees on the pro se Appellant and the 1997 award of attorneys' fees on the pro se Appellant by the

Hon. Elliott J. Wilk ("IAS court").determining the precise dollar amount of the against the Appellant.

Permission of the Court is also sought to expand the record below to include the record of proceedings material and necessary for a full and fair hearing of the issues appealed herein. These items include the proceedings in the instant case had prior to and subsequent to the Judgment and not already contained in the record, and the proceedings in McKoan exclusive of those already contained in the record. These materials are necessary for a full and fair hearing.[1]

Said decisions, orders and judgments of the trial court, the IAS courts and the appellate courts should be reversed in all respects. Trial court judgment R.7-8 ; IAS court decisions, orders and judgments: R.24 [July 14, 1997 mo. seq. 002], R.877 [July 14, 1997 mo. seq. 001], R.17-19 [September 16, 1997], R.21-23 and R.1258-1260 (October 22, 1997 proposed Order and Order, respectively); McKoan decisions, orders and judgments: R.668-672 [IAS court], R.677-679[appellate decision], R.680 [appellate reargument], R.680.1 [Court of Appeals], R.681 [US Supreme Court].

Respondents General Electric Company, Incorporated, Kidder Peabody Group, Incorporated, Kidder Peabody & Company, Incorporated, Edward A. Cerullo, Richard LaFergola, and Joel "JJ" McKoan are referred to herein as "General Electric", "Kidder Group", "Kidder", "Cerullo", "LaFergola", and "McKoan". The instant case is referenced

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[1]On objection from Respondents, the proceedings prior to and subsequent to the trial court decision of June 3, 1998 (other than those contained in the exhibits entered at trial) were not reprinted in the Record. Permission of the Court to expand the record to include these materials is necessary if Appellant is to receive a full and fair hearing. (*See* Relief Necessary For Full And Fair Hearing).

herein as "General Electric" and the proceedings had in General Electric under appellate index no. 3734/97 are referred to as the "prior appeal" and "proceedings under prior appeal". The proceedings under Kliebert vs. McKoan, et al., 643 N.Y.S.2d 114 (1st Dep't), lv. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996) as "McKoan".

Neither Respondents nor Appellant appeared at trial; both were represented by counsel. Representing Respondents was Miller & Wrubel, P.C. which is the same law firm that represented Respondents McKoan and is referred to herein as "Miller & Wrubel"; Joel M. Miller, Esq., is a senior partner at Miller & Wrubel and referred to herein as "Miller"; Michael E. Gerber, Esq., is an associate with Miller & Wrubel and referred to herein as "Gerber". Donald Rosenkrantz, Esq., appeared for Appellant during the proceedings at trial and is referred to herein as "Rosenkrantz".

Appellant refers to the proceedings in the instant case as "General Electric" and the proceedings in Kliebert vs. McKoan, 643 N.Y.S.2d 114 (1st Dep't), lv. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996) as "McKoan". Respondents refer to them as "Kliebert 2" and "Kliebert 1", respectively. Appellant refers to Respondents' motion to dismiss on behalf of Respondent Richard LaFergola for lack of personal jurisdiction variously as the "LaFergola Motion" and the "personal jurisdiction motion". Respondents refer to this as the "personal jurisdiction motion". Appellant refers to Respondents' motion to dismiss on behalf of all the Respondents and for attorneys fees variously as the "April Motion" and the "*res judicata* motion". Respondents refer to this as the "Res Judicata Motion".

In the hope of possibly avoiding the potential of prejudice which is inherent given the size and unwieldy nature of the Record, Appellant has reproduced in Exhibit 1 the pages in the Record referenced in this affidavit exclusive of the transcript which appears in the Record on pages R.82 through

R.405. Exhibit 2 contains Defendants' 1 as entered into evidence at trial (R.1273-1311). References to excerpts from the transcript at trial indicate the page(s) in the Record on which they appear and the page and line as they appear in the transcript. Example: (R.85[P.4L.6-10]) refers to page R.85 in the Record which is page 4 of the transcript; the excerpt appears at lines 6 through 10.

OVERVIEW AND SUMMARY OF ISSUES AND ARGUMENT:

The Chilling Effect On The Future Of Pro Se Law

Appellant's arguments are divided into 2 broad areas. The first involves the history making decisions by the lower courts in the instant case awarding attorneys' fees against a pro se litigant[2] (the Appellant), commencing separate proceedings to determine the exact amount of such an award against a pro se litigant[3], and setting the exact dollar amount of said award in excess of the legal limit in effect at the time the award was made[4] (*See* Argument Point I). The second broad area is comprised of issues in the proceedings underlying the award of attorneys' fees and the separate proceedings had to determine

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[2]Historically, courts have restricted the award of attorneys' fees to actions where the parties are represented by attorneys.

[3]There is no precedent for such proceedings against a pro se litigant.

[4]There is no precedent for setting the exact dollar amount of the award of attorneys' fees on the basis of law not in effect at the time the award was made. The court which determined the exact dollar amount of the award based its decision on law that become effective in 1998 and not on law in effect at the time the award was made by a separate court (1997). There is no precedent for superceding the law in effect at the time the award of attorneys' fees with law which become effective after the award was made.

the exact dollar amount of the award (*See* Argument Points II through V). In both broad areas the actions of the courts are in conflict with law and violate Appellant's rights to fair and equal treatment before the law and Appellant's rights to substantial and procedural due process. In both areas novel questions of grave social importance are raised, including but not limited to the chilling effect such a ruling would have on the self-represented. Both areas directly involve constructions of the constitution of the state of New York and the federal constitution.

Respondents have argued in the courts below (and it is assumed Respondents will argue here) that the courts may not review any issue of law which arises from proceedings which underlie and give jurisdiction to the proceedings which determined the exact dollar amount of the award of attorney's fees[5]. Respondents have demanded that the reviewing courts not read the single document which is fundamental to -- and the basis of -- the instant proceeding and the proceedings heretofore: the Complaint (R.615-667). Respondents have demanded that the courts not review the legal sufficiency of the decisions[6] which made the 1997 attorneys' fees award and which are the sole basis for the proceedings to determine the exact dollar amount of said award. Respondents have demanded that the courts not read the law in effect at the time of the award of attorneys' fees: the 1997 version of 22 N.Y.C.R.R. 130.1. Yet Respondents have never provided a statutory or case law basis for such demands. The reason is simple, there is no such statutory or case law basis. Respondents demands are

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[5]As argued by Respondents, the award of attorney's fees was made in December 1997 during proceedings before New York County Supreme Court Justice Elliott J. Wilk. Separate proceedings were had in June 1998 before Justice Robert D. Lippmann to determine the exact dollar amount of the award of attorneys' fees made by Justice Wilk in 1997.

[6]See previous footnote.

made only in an attempt to lead the courts into error and to have the courts deny Appellant his rights to a full and fair hearing on all the issues bearing on the proceedings which determined the exact dollar amount of the award. This the Court must not be misled by Respondents for to do so would deny Appellant's rights to fair and equal treatment, and to substantial and procedural due process (*See* PRAYER TO THE COURT: Plea To The Court For A Careful Reading Of The Pro Se Complaint).

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the trial court its decisions, orders and judgments dated June 3, 1998 (R.7-8) and August 8, 1998 and subsequent to August 8, 1998 violate Appellant's rights under federal and state constitutional law and guarantees, including the guarantees of due process and fair and equal treatment before the law; violate state legislated law and law; violate state judicial rules, commit judicial error and abuse its discretion?

2. Did the IAS court in its decisions, orders and judgments dated July 14, 1997 (R.24, R.877), September 16, 1997 (R.17-19), October 22, 1997 (R.21-23 and R.1258-1260 proposed order and Order, respectively) violate Appellant's rights under federal and state constitutional law and guarantees, including the guarantees of due process and fair and equal treatment before the law; violate state legislated law and law; violate state judicial rules, commit judicial error and abuse its discretion.

3. Did Appellant's Complaint (R.615-667) state causes of action?

4. Were alleged facial deficiencies in Appellant's causes of action in the instant complaint capable of correction by discovery and amendment?

5. Can facts unknown to Respondents be the basis of "probable cause"?

6. Which, if any, of the facts underlying the causes of action in the instant complaint were determined against Appellant prior to this action?

7. Can a private citizen or private corporation escape punishment if they interpose state actors between themselves and their victims to carry out violations of constitutional law, statutory law and common law?

APPEAL TO THE CONSCIENCE OF THE COURT

This is an appeal to the conscience of the Court for just treatment -- an appeal to the conscience of the Court for a full and fair hearing, and for substantial and procedural due process. Just treatment, a full and fair hearing, and substantial and procedural due process have been denied Appellant in the proceedings in the courts below. Essential to Appellant's receiving just treatment, a full and fair hearing, and substantial and procedural due process are: (1) a full and careful reading of this affidavit in support of the instant motion, (2) a full and careful reading of the Complaint (R.615-667), (3) a full and careful reading of the laws cited by Appellant. As argued throughout this affidavit, Appellant was denied these constitutional rights to a full and fair hearing, and to substantial and procedural due process in the decisions of the court's below.

This is an appeal to the conscience of Court for particularity in its decision as the questions of law and the issues raised here are novel, are without precedent and affect each and every litigant coming before the courts in a civil matter whether appearing pro se or by legal representation. The questions of law raised involve violations of federal and state constitutional guarantees, conflicts of law and conflicts of court rules. For

many -- if not all -- of the questions of law there is no controlling ruling by the Court of Appeals or the United States Supreme Court. Appellant begs the Court to exercise the courage necessary to answer the difficult and potentially embarrassing questions raised here and to have the courage to articulate its answer with such particularity as to provide a clear and definitive precedent on the questions of law raised.

PRAYER TO THE COURT:

Plea For A Careful Reading Of The Pro Se Complaint And This Affidavit

It is essential that the Court read the full text Appellant's pro se complaint (R.615-667) and this memorandum before considering the questions raised by this application to the Court and the arguments by the litigants. Further, it is incumbent upon the Court to read the complaint with the requisite care and attention required of a review of documents submitted by a pro se litigant who is not an attorney and who has no legal training. While reading the Complaint, Appellant begs the Court to continuously ask (1) whether the facts plead state any cause of action cognizable at law, and (2) whether any defects might have been cured by discovery and/or amendment. Any such finding provides the Court basis for granting the relief requested by Appellant. Whether Appellant's complaint stated causes of action and whether any perceived defects might have been cured by discovery and/or amendment are 2 essential questions before the Court as they were before the courts below. Determination of these questions, among others, are an obligation under law and an obligation which the courts below failed to perform (*See* Argument Point II (A) & (B)).

PRO SE APPEARANCE:

Plea For Necessary Liberties Normally Extended By The Courts To The Self-Represented

Appellant recognizes that his lack of legal training and experience are a substantial prejudice and relies on the Court to apply those liberties normally extended to a pro se litigant and to apply the appropriate law and case law without regard for Appellant's inability to recognize or cite such law. Appropriate among those legislated laws are CPLR 103 (c), 2001 and 2002 and Rule 201 of the Uniform Civil Rules for the Supreme and County Courts (*See* Argument Point IV (B)). The decisions of the courts in the proceedings below were contrary to these legislated laws and court rules.

The decisions under appeal denied Appellant his federal and constitutional guarantees to due process and fair and equal treatment before the law and are contrary to similar state guarantees and are contrary to the state law and court rules cited above, among others. Further, the courts below denied Appellant fair and equal treatment before the law by failing to extend to Appellant those liberties normally extended to a pro se litigant (*See* Argument Point IV).

RELIEF NECESSARY FOR A FAIR AND FULL HEARING:

Expanded Record Necessary And Judgment Withheld Pending All Appellant's Submissions

Expanded Record Necessary. Respondents demanded that the Record under appeal may contain only the transcript of the trial court proceedings and the exhibits entered at trial. This demand was improper and the restriction denies Appellant any possibility of a full and fair hearing. Permission of the Court is sought to expand the Record to include the proceedings leading up to and subsequent to the June 3, 1998 Judgment of the trial court, including the proceedings in McKoan, other than those which already appear in the Record.

The referenced decisions, orders and judgments in the proceedings leading up to and subsequent to the June 3, 1998 Judgment of the trial court and those in McKoan are so inextricably intertwined with the proceedings in General Electric appealed herein so as to be inseparable. A full and fair hearing of the issues under appeal here is impossible without them.

Appellant's arguments are dependent upon and make extensive reference to said proceedings which are not contained in the present Record.

Judgment Withheld Pending All Appellant's Submissions.

Appellant is not an attorney and has no legal training. While these are not Appellant's only handicaps, they serve to severely impede if not periodically cripple his ability to respond within the proscribed time limits or to proceed in the same manner that a trained attorney at bar or a large law firm would proceed.

It is necessary for this Court to read all Appellant's arguments if he is to obtain the necessary fair and full hearing on the merits and for the Court to look beyond the limits of his draftsmanship and to the substance and weight of this arguments and the relevant and necessary constitutional and legal issues contained in the facts. Appellant prays that the Court withhold judgment until all the papers have been submitted and the Court has read and reviewed all the facts and arguments therein before rendering its decision.

PLEA FOR PARTICULARITY AND CLARITY IN THE RULING OF THE COURT

Appellant begs the Court to rule with sufficient particularly and clarity as the questions here form a case of first impression. The facts alleged in Appellant's Complaint and in the proceedings below raise questions about the denial of Appellant's constitutional rights. Questions of constitutional

denials require address by the courts in particularity. The courts below failed in their obligation to address these questions, much less address them in particularity or clarity. This is egregious judicial error as these questions are unprecedented and of grave social importance.

NATURE OF THE CASE:

Denial Of Due Process And Fair And Equal Treatment Before The Law

First and foremost this case and its related case - Kliebert v. McKoan, et al., New York County Index No. 133170/94 (Kliebert v. McKoan, 643 N.Y.S.2d 112 (1st Dep't), lv. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996) ("McKoan") - deal with the denial of due process and fair and equal treatment before the law by the courts and the violation of Appellant's federal constitutional guarantees by the courts; and the supremacy of federal law and federal constitutional guarantee to state law, state constitutional guarantee and state court precepts. Secondary to these federal questions are questions of the denial by the state courts of Appellant's state constitutional guarantees and rights under state legislated law. The remaining questions involve conflicts involving the supremacy of state legislated law over court created rules; conflicts between legislated laws; conflicts between rulings of the Court of Appeals; conflicts in case law; conflicts in court rules, and the creation of case law by the state courts which provides a vehicle by which a private citizen (Respondents) may (1) commit fraud with impunity and (2) make use of state actors to deny another citizen (Appellant) his constitutional rights without fear of punishment.

CONSTITUTIONAL PROVISIONS INVOLVED

The courts below in the proceedings in the instant case and McKoan denied Appellant his federal

constitutional rights to (1) substantial and procedural due process (5th and 14th Amendments), (2) right to fair and equal treatment before the law (14th Amendment), (3) the right to trial by jury in suits at common law where the value in controversy exceeds twenty dollars (7th Amendment), (4) the right to a speedy trial in criminal prosecutions (6th Amendment), (5) the right to due process in deprivations of life, liberty or property and compensation for private property taken for public use (5th Amendment), (6) the right to be free of unreasonable searches and seizures (4th Amendment), (7) reserved rights (9th Amendment) as stated in the United States Constitution and parallel rights guaranteed under the state constitution, notably Article I Chapter 2 and Article I (1), (2), (6), (11), (12): Disputed issues of fact and disputed inferences are for a jury to decide and may not be decided by the courts as a matter of law.

The constitutional provisions referenced above provide:
ARTICLE IV:
Persons and Houses to be Secure from Unreasonable Searches and Seizures

The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches an seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

ARTICLE V:
Trials for Crime-Just Compensation for Private Property Taken for Public Use

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment

or indictment of a grand jury, except in cases arising in the land of naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

ARTICLE VI:
Civil rights in Trials for Crimes Enumerated

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII:
Preservation of Right of Trial by Jury

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law

ARTICLE IX:
Reserved Rights of People

The enumeration in the constitution or certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE XIV:
Citizenship Denied-Privileges of Citizens

Section 1. All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Respondents do not deny these denials.

RESPONDENTS MISSTATEMENTS OF CERTAIN FACTS IN THE COURTS BELOW

In support of their demand at trial to be awarded fees of $77,318.31 on the attorneys' fee award made in 1997, Respondents cited the 1998 revision of 22 N.Y.C.R.R.130-1.2 as law applicable to the 1997 award. This is patently false assertion. 1997 law is applicable to the 1997 award. Under the 1997 revision of 22 N.Y.C.R.R. 130-1.2 an award of attorneys' fees is limited to a maximum of $10,000 (*See* Argument Point I).

Respondents asserted in the courts below that the courts in McKoan and in the misdemeanor proceeding underlying McKoan ruled that Appellant had threatened Respondents and

had engaged in threatening behavior. This is a patently false statement. No such rulings were made by the courts below and no such rulings appear in the records of the proceedings below, Respondents efforts to mislead the courts notwithstanding. Similarly, Respondents assert that Appellant (1) admitted to having made one threat against Respondents, (2) admitted to having engaged in one act of threatening behavior and (3) that the courts ruled that Appellant did indeed admit to making said threats. This is patently false. Appellant (1) never made any threats against Respondents and Appellant never admitted to making any threats against Respondents and (2) no such rulings were made by the courts below and no such rulings appear in the records of the proceedings below.

FACTS AND PROCEDURAL HISTORY

The review of the facts does not proceed in chronological order but presents first the 1998 proceedings to determine the exact dollar amount of the 1997 award of attorneys' fees and Appellant's opposition to said proceedings.

A. Proceedings To Determine The Exact Dollar Amount Of The Award Of Attorneys' Fees: Novel And Substantial Questions Of Law

Subsequent to the award of attorneys' fees Respondents filed their note of issue for trial to determine the exact dollar amount of the award. Respondents demanded an award of $71,000 in said papers. Appellant wrote the scheduled trial court advising the court that the decisions, orders and judgments of the IAS court were legally insufficient to make an award of attorneys' fees or invest the court with legal jurisdiction to determine the amount of the award. There was no reply from the court to Appellant's letter.

Appellant then hired counsel for him to appear on the issue of the trial on the amount of the award of attorneys' fees.

Counsel approached the appellate court for, among other things, a stay pending perfection of Appellant's prior appeal. The appellate court denied counsel's request for a stay.

Trial was scheduled and had on June 1 and June 2, 1998 and a decision and judgment rendered on June 3 awarding Respondents' attorneys' fees in the amount of $60,000 (R.7-8). Neither Respondents nor Appellant were present at the trial. At trial Respondents attorneys' testified that Appellant's Complaint contained novel questions and substantial questions of law and that said substantial and novel questions were of such magnitude that said attorneys required weeks of dedicated legal expertise and research (purportedly valued at $76,863.31) in order to defeat Appellant's claims. Appellant dismissed counsel and appeared pro se on the further proceedings on the issue of the determination of the exact dollar amount of the 1997 award of attorneys' fees and filed an appeal of the June 3, 1998 Judgment which set the exact dollar amount of the 1997 award of attorneys' fees at $60,000.

Concurrent with the perfection of the prior appeal, Appellant, appearing pro se, (1) moved the appellate court for reargument and appeal of its decision denying stay of the June 1 and June 2, 1998 trial, and (2) moved the appellate court for permission to expand his earlier brief on appeal citing the 1997 revision of 22 N.Y.C.R.R. 130-1.2 as prohibiting the award of attorneys' fees and denying jurisdiction to the trial court on the issue of the amount of the attorneys' fees to be awarded. The appellate court denied both of Appellant's motions.

Appellant moved the trial court to vacate or set aside its June 3 Judgment. The trial court denied his motion. Appellant moved for reargument and reargument was subsequently denied. Appellant appealed the decision of the trial court. Said appeal was dismissed on motion by Respondents as Appellant identified the wrong decision under appeal in his original appeal papers.

B. The Underlying Proceedings

1. Overview And The Legal Basis For The Filing Of The Complaint

Under appeal and review here are (1) the trial which was had to determine the amount of attorneys' fees, the decision of the trial court setting the amount of the award at $60,000, the award of attorneys' fees and injunction by the IAS court (*See* Argument Point I), and (2) the denials of substantial and procedural due process and fair and equal treatment before the law (5th & 14th Amendments) in the court decisions had heretofore in General Electric and in McKoan (*See* Argument Points I, II, III, IV, V).

In 1994 Appellant brought an action (McKoan) against all the Respondents except Cerullo. In McKoan, the courts found that Appellant had attempted to plead 2 causes of action under tort law: malicious prosecution and emotional distress (R.668; R.677). The courts found that Appellant had plead conclusory allegations and bare legal conclusions and not facts to support the 2 claims (R.668; R.677). The IAS court (Wilk, Elliott J.) dismissed the McKoan action for failure to state causes of action under tort law for malicious prosecution and intentional infliction of emotional distress finding that Appellant had plead "conclusory and unsubstantiated allegations" and not facts to support his 2 claims (R.612). The IAS court also denied Appellant permission to serve a second amended complaint since it found that Appellant there, too, had failed to plead facts but had only plead conclusions.

The McKoan decision was affirmed by the appellate court (R.677). The appellate court found as did the IAS court below that Appellant had (1) plead only causes of action of malicious prosecution and emotional distress under tort law and (2) that Appellant had plead "bare legal conclusions" and not facts necessary to support his 2 claims (R.677). The appellate

court denied Appellant permission for reargument and leave to appeal to the Court of Appeals (R.680). The Court of Appeals denied Appellant leave to appeal (R.680.1). The United States Supreme Court refused to docket Appellant's petition for writ of certiorari because it was jurisdictionally out of time by 1 day (R.681).

Appellant brought the action in General Electric by the filing of the Complaint dated December 12, 1996 (R.615-667) basing his decision to file on the explicit rulings of the IAS court and the appellate court in McKoan: bare legal conclusions and conclusory and unsubstantiated allegations and not facts were plead in McKoan. General Electric alleges 19 explicit causes of action not contained in McKoan: prima facie tort (1st through 6th causes of action); conversion and breach of fiduciary duty and contract (8th, 9th, 10th and 11th causes of action), violation of constitutional guarantees (7th, 12th through 19th causes of action exclusive of the 16th), civil rights violations under 42 U.S.C. Chapters 1983 and 1985 (12th through 19th causes of action exclusive of the 18th) and implicit causes of action for assault and negligence. General Electric is based on (1) legislated law (2) on facts and causes of action not contained in the McKoan complaint (the courts having ruled in McKoan -- and Respondents having argued in McKoan -- that Appellant had only plead 2 causes of action under tort law for malicious prosecution and emotional distress in McKoan and that Appellant did not plead facts in McKoan to support his causes of action but, rather, had merely plead conclusions to support his 2 causes of action) and (3) on facts and issues left undetermined in McKoan

Respondents filed 2 motions in response to Appellant's Complaint. The first was for dismissal of the action against Respondent LaFergola ("LaFergola Motion") for failure to make legally binding service (R.902). The second ("April Motion"), on behalf of all Respondents, was to dismiss the Complaint for failure to state causes of action and as being

barred by rules established by the courts (R.540). Included in the April Motion was a demand for attorneys' fees and injunction. The IAS court granted both motions on alleged defaults (R.24; R.877) and denied Appellant's motion to vacate the alleged default (R.17-19). The appellate court affirmed the lower court decision and denied Appellant's motion for reargument and for permission to appeal to the Court of Appeals. The Court of Appeals denied Appellant's application because of error by Appellant stating in its decision that the motion (application): "is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution".

The Complaint in General Electric (R.615-677) states causes of action and dismissal pursuant to CPLR 3211(a) (7) and CPLR 3211 (a) (5) is contrary to the law and a denial of Appellant's rights to due process and to fair and equal treatment before the law (*See* Argument Point II & III). Appellant's Complaint is permitted under (1) CPLR 205(a) which permits Appellant to bring General Electric even in the event that the same facts and causes of action appear in both complaints (*See* Argument Point III), (2) the explicit rulings by the courts in McKoan which found (a) Appellant to have plead conclusions and not facts to support his cause of action in McKoan and (b) that a dismissal for facial insufficiency is not a decision on the merits, and (3) the instant complaint is based on facts and issues either not raised or left undetermined in McKoan. Respondents cite CPLR 3211 (a) (5) (res judicata, collateral estoppel) as law in conflict with CPLR 205 (a). The explicit conflicts between the legislated laws cited are unresolved by any decision of the Court of Appeals.

The General Electric action is brought in good faith and, among other things, based on the law contained in CPLR 205(a) and the explicit ruling of the courts in McKoan. The award of attorneys' fees against the Appellant - as demanded by Respondents and granted by the IAS on default and without

comment in its 1997 decisions - is contrary to the strict and explicit requirements of the 1997 revision of 22 N.Y.C.R.R. Chap. 130-1.2 (*See* Argument Point I). The awarding of attorneys' fees and the issuance of an order enjoining plaintiff from further litigation against Respondents or in connection with the facts underlying this action without the ability to bring such an action represented by counsel or with court permission - on default and without comment - is contrary to law and unprecedented (*See* Argument Point I).

Service on Respondent LaFergola and the filing of opposition papers on the April Motion were made according to law. The failures of the courts below to uphold service and filing are contrary to law (*See* Argument Point IV).

The award of attorneys' fees, the trial had to determine the amount of said award, the setting of the amount at $60,000 and the terms of injunction are all prohibited under law (*See* Argument Point I).

2. Appellant's General Electric Complaint: Failure Of The Courts To Read The Complaint

The IAS court in General Electric did not read the Complaint to determine whether or not the facts stated any cause of action cognizable at law. Respondents admit this in their brief filed in the prior appeal. Appellant begs the Court to do so on this appeal.

The Complaint in General Electric alleges 19 explicit causes of action and 2 implicit causes of action and pleads facts to support those causes of action. Respondents do no deny these facts nor do they argue that the facts are conclusions. The IAS court and the appellate court found that facts were plead in the General Electric complaint (R.668 IAS decision). In McKoan the IAS court and the appellate court found - and

Respondents argued - that Appellant had not plead facts, but had plead bare legal conclusions (R.672; R.677). In McKoan the IAS court and the appellate court found -- and Respondents argued -- that Appellant had plead only 2 causes of action under tort law: malicious prosecution and emotional distress. The General Electric Complaint distinguishes itself from the McKoan complaint in that in the instant complaint (1) the IAS court, the appellate court, and Respondents found the pleadings to be based on facts rather than conclusions and (2) Appellant here pleads 19 explicit causes of action and 2 implicit causes of action.

The explicit causes of action are: prima facie tort (1st through 6th causes of action); conversion and breach of fiduciary duty and contract (8th, 9th, 10th and 11th causes of action), violation of constitutional guarantees (7th, 12th through 19th causes of action exclusive of the 16th), and civil rights violations under 42 U.S.C. Chapters 1983 and 1985 (12th through 19th causes of action exclusive of the 18th); the implicit causes of action are assault and negligence. No where in McKoan is there review of said explicit or implicit causes of action other than malicious prosecution and emotional distress as tort law violations - as Respondents themselves argued to the courts in McKoan (*See* R.774, par. 22).

Appellant argues herein that the causes of action claimed under United States Code Chapters 1983 and 1985 as constitutional guarantee violations also state causes of action under New York State law (*See* Argument Point II & III) and that the malicious prosecution claim and emotional distress claims in McKoan may be brought again under legislated law under CPLR 205(a) (*See* Argument Point III).

3. Factual Background Of The McKoan Action And General Electric Action

The Court is respectfully directed to the Complaint for a full description of the facts summarized here (R.615-667).

In April 1993, Respondents seized and destroyed Appellant's personal correspondence, documents, files and records; seized and destroyed personal correspondence, documents, files and computer programs belonging to Appellant and stored in Appellant's personal computers; seized and damaged Appellant's personal computers; and dismissed Appellant who was a Kidder employee. Kidder Group is the parent of Kidder and General Electric is the parent of Kidder Group and Kidder. Cerullo, LaFergola and McKoan were Kidder employees.

Starting in April 1993 Respondents seized, opened, read and destroyed sealed and unsealed personal correspondence and mail already in Appellant's possession sent to Appellant through the United States Post Office and seized, opened, read and destroyed sealed and unsealed personal correspondence delivered to Appellant by the United States Post Office.

Respondents intercepted, accessed and recorded plaintiff's conversations by unlawful wiretapping and the use of mechanical and electronic devices. Respondents hired agents who, among other things, for various periods between 1993 and 1994:

> ". . . dashed in front of and at plaintiff in a threatening manner, confronting plaintiff at extremely close range, stepping and charging into the path of plaintiff and impeding thereby his lawful movement with their persons and their automobiles; suddenly jumping out and charging at plaintiff from cars, buildings and other concealed places; touching the person of plaintiff without his specific consent or request, closely walking behind beside or in front of plaintiff on public streets and places; running after

and chasing plaintiff into oncoming traffic, down streets, down flights of steps, onto subway platforms and into oncoming trains.

. . . blocked, obstructed and interfered with plaintiff's access, entry, movement and egress to streets, buildings and other public places . . . .

. . . When plaintiff walked rapidly, defendants agents . . . ordered plaintiff to "Walk slower or I'll put a bullet in your leg".

. . . surrounded and chased plaintiff in motor vehicles on public highways in New York State at speeds in excess of 55 miles an hour, following at distances of less than 1 car length and forcing plaintiff's vehicle off the road.

. . . blocked, obstructed and interfered with plaintiff's access to and egress from cabs and livery service vehicles.

. . . took photographs of, and made daily written notes of and made sound recordings of plaintiff's conversations in and outside his homes.

. . . for the period between December 1993 through February and April 1994 this following and interference with plaintiff's movements and associations was overt and visible to passersby at all times. The aforesaid actions caused passersby to stop and stare at plaintiff and make comments to plaintiff causing embarrassment and torment."[7] (id., R.627-629)

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[7]Respondents do not deny that the statements alleged were made or that the described conduct occured. Incredulously,

According to the agents hired by Respondents, Respondents solicited the killing of the Appellant but the agents refused. (id., R.625)

In late 1993 Respondents fabricated false statements imputing criminal activity by Appellant. Solely on the basis of these false statements Appellant was arrested by an investigator of the New York County District Attorney's office on a complaint filed by the investigator (id., R.664). The sole content of the complaint was the false and misleading information provided by Respondents LaFergola and McKoan about events at which the investigator was not present and which had occurred over two weeks before the filing of the investigators' complaint. LaFergola and McKoan signed affidavits attesting to the truthfulness of the information in the investigator's complaint (id., R.666-667). The affidavits signed by LaFergola and McKoan bore the statement: "False statements made herein are punishable as a Class A misdemeanor pursuant to section 210.45 of the penal law" (id., R.666, R.667). In the proceedings below, Respondents have never denied that the statements were false or misleading.

Respondent LaFergola admitted before witnesses that the statements he made in the affidavit filed with the District Attorney's office were false, that they were manufactured by the corporate Respondents and that he was forced to make them by the corporate Respondents (R.631).

Respondent Joel "JJ" McKoan approached Appellant and warned Appellant of Respondents' scheme to have Appellant arrested.

Subsequent to McKoan's warning Appellant was arrested and charged with a misdemeanor -- menacing in the

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Respondents argue that said conduct constitutes 'legal' 'surviellence'.

third degree. At arraignment Appellant plead 'not guilty'. Appellant denied the allegations in the misdemeanor complaint other than that he had made, in substance, one of the statements alleged in the misdemeanor complaint and Appellant explicitly denied that said statement was a threat. Appellant moved to dismiss for facial insufficiency; the People did not amend their complaint in response to Appellant's motion to dismiss. No trial was held and in October 1994 the misdemeanor court dismissed the complaint for facial insufficiency. The People did not appeal the dismissal or file a new complaint. Respondents did not initiate a new action against Appellant after the dismissal.

The misdemeanor court did not make any findings as to whether or not the events alleged in the complaint had occurred or whether or not the statements alleged in the complaint had been made. The misdemeanor court made no findings as to whether or not LaFergola and McKoan were truthful in their affidavits. There was no finding by the misdemeanor court that the Appellant had engaged in threatening behavior or made threatening statements or had violated any statute.

4. **The McKoan Action Amended And Proposed Complaints**:

Two Causes Of Action But No "facts"; Only "bare legal conclusions"; "conclusory & unsubstantiated allegations"; And "dismissal for legal insufficiency . . . [is not] an adjudication on the merits"

The IAS court in McKoan found that the Appellant had alleged only violations of tort law for malicious prosecution and emotional distress against Respondents Kidder, LaFergola and McKoan and that Appellant had plead only conclusions - not facts - to support his allegations (R.668). The IAS court in its decision stated: "A dismissal for legal insufficiency is neither an acquittal nor an adjudication on the merits [emphasis added].".

The appellate court agreed with the findings of the IAS court (R.677). In its decision the appellate court ruled on only causes of action under state tort law for malicious prosecution and emotional distress and characterized the allegations in Appellant's complaints as "bare legal conclusions". The appellate court found that Appellants' other contentions - other than those of malicious prosecution and emotional distress - to be without merit. The court did not specify or provide any elaboration on what it recognized as Appellant's other contentions.

No where in the decisions of the courts in McKoan is there mention of the causes of action - other than malicious prosecution and emotional distress under tort law - which are alleged in the instant complaint: prima facie tort (1st through 6th causes of action); conversion and breach of fiduciary duty and contract (8th, 9th, 10th and 11th causes of action), violation of constitutional guarantees (7th, 12th through 19th causes of action exclusive of the 16th), and civil rights violations under 42 U.S.C. Chapters 1983 and 1985 (12th through 19th causes of action exclusive of the 18th) or the implicit causes of action for assault and negligence. No where in McKoan is there review of said causes of action. Only causes of action for malicious prosecution and emotional distress as tort law violations are reviewed in the decisions, orders and judgments of the courts.

Respondents do not deny the above facts.

5. **The Explicit Rulings In McKoan: 2 Causes of Action/No "facts"; Only "bare legal conclusions"; "conclusory & unsubstantiated allegations"; And "dismissal for legal insufficiency . . . [is not] an adjudication on the merits"**

In McKoan, the courts found that Appellant had plead only 2 causes of action under tort law: malicious prosecution and emotional distress (R.668; R.677). The courts found that Appellant had plead conclusory allegations and bare legal conclusions and not facts to support the 2 claims (R.668; R.677). The IAS court (Wilk, Elliott J.) dismissed the McKoan action for failure to state causes of action under tort law for malicious prosecution and intentional infliction of emotional distress finding that Appellant had plead "conclusory and unsubstantiated allegations" and not facts to support his 2 claims (R.672). The IAS court in its decision stated: "A dismissal for legal insufficiency is neither an acquittal nor an adjudication on the merits [emphasis added] . . . .". The IAS court also denied Appellant permission to serve a second amended complaint since it found that Appellant there, too, had failed to plead facts but had only plead conclusions.

The IAS court decision was affirmed by the appellate court in Kliebert v. McKoan, 643 N.Y.S.2d 114, the appellate court having found as did the IAS court below that Appellant had plead only causes of action of malicious prosecution and emotional distress under tort law and that Appellant had plead "bare legal conclusions" and not facts necessary to support his 2 claims (R.677).

Respondents do not deny that they made the same arguments in McKoan .

6. **Respondents' Sworn Testimony In McKoan: Appellant Plead 2 Causes of Action/No "facts"; Only "bare legal conclusions"; "conclusory unsubstantiated allegations"; And "dismissal for legal insufficiency . . . [is not] an adjudication on the merits"**

Respondents also found - and supposedly argued truthfully and in good faith before the Court of Appeals and the appellate court - that Appellant had plead only claims of malicious prosecution and emotional distress. In their arguments before the courts, Respondents argued repeatedly and insistently that Appellant had plead and preserved no claims other than the tort claims of malicious prosecution and emotional distress. (*See* Respondents' arguments before the Court of Appeals R.777 par. 18-19, R.774 par. 22, R.786 par. 45; *See* Respondents' arguments before the appellate court: R.695 par. 9, R.713 par. 47, R.727 par. 66, R.728 par. 66 footnote 18, R.736 par. 79 & par. 80, R.742 par. 89, R.759 par. 16).

7. **Opposition Papers to the April Motion: Respondents Witnessed The Filing Of Opposition Papers But Withheld This Crucial Fact From The Courts**

Litigants agreed by stipulation to a return date of July 10, 1997 on the filing of papers relevant to Respondents' 2 motions to dismiss (LaFergola Motion and April Motion). According the affidavit of the process server, the server answered the call on July 10, 1997 and presented Appellant's opposition papers to the court. Corinne J. Parker, an employee of Miller & Wrubel (the law firm representing Respondents) appeared at the call on behalf of Respondents and witnessed service of Appellant's papers on the court by Appellant's process server (R.1292). Corinne J. Parker then informed Michael E. Gerber, an attorney at Miller & Wrubel, of the facts surrounding the appearances at the calendar call (R.1292). Michael E Gerber later discussed the results of the calendar call with the firm's principal, Joel M. Miller (R.1292-1294). Respondents acknowledge service of the opposition papers to the April Motion on them. Respondents have never denied that Appellant's process server answered the call along with Respondents' employee Corinne J. Parker on July 10, 1997 and filed opposition papers or that Corinne J. Parker informed

attorney Michael E. Gerber of said results at the calendar call. However, neither Respondents or Respondents' attorneys or attorneys' employees (Miller & Wrubel, Joel M. Miller, Michael E. Gerber, Corinne J. Parker) have ever come forward with the evidence in their possession that Appellant answered the call and filed papers at the call. The IAS court stated that no opposition papers could be found by the Clerk of the Supreme Court (IAS court). The IAS court (Supreme Court) granted Respondents' April Motion on this disputed and alleged default (R.24).

8. **<u>Appellant's Service Upon LaFergola</u>: Respondents Efforts To Evade Service Upon LaFergola And LaFergola's Admissions Of Duress From Respondents**

Appellant was aware from LaFergola that he, LaFergola, had moved from his former residence at 47 Bramble Lane, Matawan (Old Bridge), New Jersey 07747 to Manhattan after his divorce and re-marriage. This information was given to Appellant by LaFergola on April 28, 1995 at a meeting between LaFergola, other Kidder employees, and Appellant. This was the meeting referenced in the Complaint where LaFergola admitted that:

> "the statements attributed to him [LaFergola] in the misdemeanor complaint are false, that they were composed by the corporate Defendants, that prior to making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that LaFergola denied repeatedly that these words were said by Appellant or that anything threatening was said by Appellant in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, LaFergola has stated to witnesses that Cerullo told him

not to be concerned about making false statements owing to Defendants' influence in the District Attorney's Office."

R.632, par. 22 (c)). At the time that the summons and complaint in the instant action were filed with the court on December 13, 1996, Appellant did not know LaFergola's current home or work addresses. Investigation was begun by Appellant and on Appellant's behalf to determine LaFergola's home and business addresses. NYNEX information for area code 212 was called and a listing requested for Richard LaFergola in Manhattan. According to the operator from NYNEX, NYNEX had a phone number for Richard LaFergola, but at the customer's request it was unlisted and NYNEX could not give it out. The postmaster of LaFergola's previous address was called but according to the post office, the post office was prohibited by law from giving out forwarding information. Persons who were known to have worked with LaFergola at his last known employer, Kidder were called. None knew of LaFergola's current residence address but they reported that LaFergola was working at R.J. Kross Associates Ltd. ("Kross"), 90 Washington Street, New York, NY 10006. Personal service was then attempted on or about December 23, 1996 by Dexter Mottley ("Mottley"). When he attempted service on or about December 23, 1996, Mottley was told by Kross that LaFergola did not work at Kross and Mottley left without making service based on this information. After Mottley's attempted service, a telephone call was placed to Mr. LaFergola at Kross on Kross' number (212) 483-8800. The caller was asked to identify himself and the purpose of his call. After identifying himself as a former co-worker of LaFergola's, the call was put through and LaFergola responded to the caller. Service was then made by Harry Torres ("Torres") of Allboro Process Service, Inc. ("Allboro"), 150 Nassau Street, New York, NY in accordance with CPLR 308 (2) on February 18, 1997 and the affidavit of service was filed with the New York

County Clerk's Office ("Clerk's Office") on February 19, 1997 (R.944; R.945; R.952 for CPLR 308).

According to the affidavit of Torres (R.944), service of the summons and complaint was made on LaFergola of February 18, 1997 at 8:45 a.m. at R.J. Kross Associates Ltd., 90 Washington Street, 24th Floor, New York, NY 10006:

> "by delivering thereat a true copy of each [summons with notice and complaint] to J. Halon co-worker a person of suitable age and discretion. That person was also asked by deponent whether said premises was the defendant's actual place of business and the reply was affirmative."

J. Halon is described by Torres as a white male, approximately 35 years old, weighing approximately 200 pounds, approximately 6'0" tall and having brown hair. The affidavit goes on to state that:

> "On 2/18/97 deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to defendant at defendant's actual place of business at R.J. Kross Associates Ltd., 90 Washington Street, 24th Fl, New York, New York 10006 and deposited said wrapper in a post office of the United States Postal Service within the New York State."

The affidavit also states that the mailing was by first class mail and that the envelope was marked personal and confidential.

Appellant was then served by mail with Respondent LaFergola's Notice of Motion to Dismiss for Lack of Personal Jurisdiction dated March 31, 1997 (R.902), and Memorandum of Law of Defendant Richard LaFergola in Support of his Motion to Dismiss the Complaint for Lack of Personal Jurisdiction ("memorandum") dated March 31, 1997 by Michael

E. Gerber ("Gerber") and Joel M. Miller ("Miller") of counsel (R.913) and affidavits by Miller and LaFergola dated March 27, 1997 and March 26, 1997, respectively (R.904; R.907).

Respondent asserts in his memorandum of law and in Miller's affidavit that no affidavit of service on him could be found by Respondents in the New York County Clerk's Office prior to the filing of said memorandum and the affidavits accompanying said memorandum (R.920, par. 9, 10; R.909, par. 7, 8). Respondent never requested a copy of the affidavit of service from Appellant.

LaFergola in his affidavit dated March 26, 1997 admits receipt of a true copy of the summons and complaint (R.905, par. 4) but rebuts the February 18, 1997 affidavit of Torres (R.944), LaFergola stating that:

> "On or about February 19, 1997, I was informed that papers with my name on them had been stuffed between glass doors at the business address of my <u>former</u> [emphasis in original] employer, at 90 Washington Street, New York, New York 10006." [March 26, 1997]

and later on in the affidavit:

> "The 90 Washington Street, Manhattan address is not he location of my actual place of business, was not the ocation of my actual place of business in February 1997 . . " [March 26, 1997]

(R.904, par. 3 and R.905 par. 6, respectively).

<u>LaFergola does not deny that he was an employee of Kross during December 1996 or February 1997</u>.

There in no further elaboration on details of service in the LaFergola affidavit other than the one sentence (above)

stating that on 'information' from a unidentified third party "that papers with my name on them had been stuffed between glass doors at the business address of [his] former employer." LaFergola does not clarify if Kross was his former employer on March 26, 1997 - the date of the affidavit - or on the date of service in February -- a crucial difference.

Appellant received information on August 11, 1997, that LaFergola was currently residing at 55 West End Avenue, Apt 11F, New York, New York 10023. Appellant requested that Allboro attempt to make service of the summons and the complaint in accordance with CPLR 308 (1) personal service or CPLR 308 (2) (leaving with person of suitable age and discretion and mailing). According to the affidavit of Torres, service was made on LaFergola on August 14, 1997 at 1:45 p.m. at 55 West End Avenue, Apt 11F, New York, New York 10023:

> "by delivering thereat a true copy of each [summons with notice and complaint] to George Markaj doorman/auth. That person was also asked by deponent whether said premises was the defendant's dwelling house and the reply was affirmative."

(R.946). George Markaj is described by Torres as a white male, approximately 35 years old, weighing approximately 140 pounds, approximately 5'6" tall and having black hair. The affidavit goes on to state that:

> "On 8/15/97 deponent also enclosed a copy of same in a ostpaid sealed wrapper properly addressed to defendant t defendant's dwelling house at 55 West End Avenue, Apt 11F, New York, New York 10023 and deposited aid wrapper in a post office of the United States Postal Service within New York State."

The affidavit also states that the mailing was by first class mail and that the envelope was marked personal and confidential.

9. Appeal Of Decisions In General Electric

a. 1997 Decision Dismissing The Complaint And Making The Award Of Attorney's Fees

Appellant appealed the 1997 decision of the IAS court (Hon. Elliott J. Wilk) which, among other things, dismissed Appellant's Complaint in General Electric. The appellate court denied Appellant's appeal and denied Appellant's subsequent motion for reargument and for other relief, including appeal to the Court of Appeals. The Court of Appeals denied Appellant's application because of error by Appellant stating in its decision that the motion (application): "is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution".

b. 1998 Decision Setting The Exact Dollar Amount Of The 1997 Award Of Attorneys' Fees

Appellant appealed the June 3, 1998 decision of the trial court (Hon. Robert D. Lippmann) which set the exact dollar amount of the 1997 award of attorneys fees made by Justice Elliott J. Wilk. The appellate court denied Appellant's appeal and denied Appellant's subsequent motion for reargument and for other relief, including appeal to the Court of Appeals. This appeal is now before the Court in the form of this application.

ARGUMENT

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO FAIR AND EQUAL TREATMENT BEFORE THE LAW AND TO

SUBSTANTIAL AND PROCEDURAL DUE PROCESS

PRINCIPAL ARGUMENTS

The instant action presents legal questions of grave social importance and novel questions never raised before the Court. These questions form a landmark case of first impression. The questions of law involve denials of federal and state constitutional rights by the courts below, conflicts between legislated state laws and federal and state constitutional law, conflicts between legislated laws, conflicts between legislated law and court created rule, conflicts between rulings of the Court of Appeals, conflicts among the appellate divisions, and obvious judicial error. This holds true regardless of whether (1) the Court accepts Appellant's arguments that the instant complaint is permitted under (1) legislated law, (2) court rules and (3) case law (*See* Argument Points I, II, III, IV & V) or (2) the Court accepts the finding of the courts below that the facts in the instant complaint are "same facts" as those plead in McKoan. Under the second proposition ("same facts") the Court can only come to one conclusion when reading the facts stated in the General Electric Complaint (R.615-667) (1) as if they were the "same facts" stated in the McKoan complaint and (2) in a light most favorable to the Appellant: that the McKoan complaint states a cause(s) of action cognizable at law and the courts in McKoan denied Appellant fair and equal treatment before the law and substantial and procedural due process (*See* Argument Point II (A)).

Every instance complained of in this application involves a denial by the courts below of Appellant's rights under the federal constitution to (1) fair and equal treatment before the law and (2) to substantial and procedural due process (5th and 14th Amendments). The explicit and implicit actions of the courts and the explicit and implicit rulings of the courts were without basis in law or based on unresolved conflicts between laws, between court rules, between legislated law and court

created rules, or on case law that is in conflict with the rights guaranteed under the federal and state constitutions. In certain instances the explicit and implicit actions of the courts and the explicit and implicit findings of the courts also denied Appellant his rights to a full and fair hearing, the presumption of truth to facts plead, the right to determination by jury of facts and inferences in dispute, and fair and equal treatment in accordance with legislated law, case law and court rules.

Denial of good service and filing (*See* Argument Point IV) and denial of discovery, amendment and the other relief requested are prohibited by law and as such are denials of Appellant's constitutional rights (*See* Argument Point V).

As to the attorneys' fee award and the proceedings to determine the exact dollar amount of the award (Argument Point I), the Court of Appeals has never affirmed a decision setting the exact dollar amount on an award of attorneys' fees on a pro se litigant and the Court has never affirmed a decision making an award of attorneys' fees against a pro se litigant. There are no circumstances in the instant case warranting creation of such a chilling precedent.

The proceedings setting the exact dollar amount of the award of attorneys' fees and the award itself are unprecedented, inappropriate, prohibited by law and denied Appellant his constitutional rights to fair and equal treatment before the law, and to substantial and procedural due process (*See* Argument Point I).

Argument Point I.
ATTORNEYS' FEES AND INJUNCTION

Novel Legal Questions Of Grave Social Importance
Landmark Case Of First Impression

A. Proceedings To Determine The Exact Dollar Amount Of The Award Of Attorneys' Fees And The Award Itself Are Unprecedented And Inappropriate

1. Unprecedented Proceedings

The proceedings setting the exact amount of the award of attorneys' fees against the pro se Appellant and the award itself are unprecedented and inappropriate as well as impermissible (*See* Argument Point I (B)). Never in the history of New York law preceding the 1998 judgment of the trial court have proceedings been had to determine the exact dollar amount of an award of attorneys fees against a pro se litigant and there are no circumstances here warranting such a radical precedent. Similarly, never in the history of New York law preceding the 1997 IAS court decisions, orders and judgments has a pro se litigant had the opposing party's attorneys' fees imposed on him under any the circumstances and there are no circumstances here warranting such a radical precedent. The Court of Appeals has never affirmed a decision which determined the exact dollar amount of an award of attorneys' fees against a pro se litigant nor has the Court of Appeals ever affirmed a decision making such an award against a pro se litigant. The reason is obvious: a pro se litigant who is neither an attorney nor a person with legal training cannot be expected to have either the knowledge or understanding of the vast body of law necessary to have scienter. This lack of scienter -- this lack of knowing understanding that one is engaging in wrongful conduct -- is a crucial ingredient in determining the amount of an award of attorneys' fees as well as whether an award should be made. The importance of scienter can be underscored by example and comparison with sections of Part 1200 Disciplinary Rules of the Code of Professional Responsibility for attorneys. Chapter 1200.3 deals with misconduct by attorneys. Among other things, subpart (4) of Part 1200.3 deals with "fraud" by attorneys. According to the rule, an attorney may not "Engage

in conduct involving dishonesty, fraud, deceit, or misrepresentation". However, according to Chapter 1200.1 (i):

> "*Fraud* does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another."

Here an attorney would escape penalty for fraudulent conduct owing to a lack of scienter.[8]

In contrast, the pro se Appellant -- a person who is neither an attorney nor a person with legal training -- is being subjected to an unprecedented punishment for his lack of familiarity with a court created principle: *res judicata*. There is no precedent for such a penalty and the reason for such a lack of precedent is obvious: such a holding is patently unjust. Further, there is no conduct engaged in by Appellant in the proceedings heretofore that are so egregious as to warrant such an unprecedented penalty. This Court must not let such an unwarranted and patently unjust precedent stand.

Indeed, it is Respondents and Respondents' attorneys' who have consistently engaged in egregious conduct (*See* Argument Point I (B) (3)). In an effort to mislead the courts, Respondents purported to cite precedents for the instant proceedings to determine the exact amount of the award of attorneys' fees against the pro se Appellant and for the award itself. Simply put, there is no such precedents. Nowhere in the cases cited by Respondents' is there a proceedings determining the exact dollar amount of an award of attorneys' fees against a pro se litigant nor an award of attorneys' fees against a pro se

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[8]See also discussion of Respondents' misconduct under Argument Point I (B) (3).

litigant or even any *mention* of proceedings awarding attorneys' fees against a pro se litigant or proceedings had to determine the exact dollar amount of such an award. In the history of New York law attorneys' fees have only been awarded against attorneys at bar and never against persons representing themselves before the courts. Further, nowhere in the cases cited by Respondents is there mention of a proceeding had to determine the exact dollar amount of an award of attorneys' fees or an award of attorneys' fees where the courts -- as here -- have failed to fulfill the strict requirements of law under 22 N.Y.C.R.R. 130-1.2 (*See* Argument Point I (B). Further, nowhere in the cases cited by Respondents are there proceedings to determine the exact dollar amount of an award of attorneys' fees against a litigant nor an award of attorneys' fees where a litigant has relied on the legislated law under CPLR 205(a) as a defense as Appellant has relied upon here (*See* Argument Point I (A) (2). Simply put, there is no precedent for the proceedings to determine the exact dollar amount of the award of attorneys' fees or for an award of attorneys' fees under the circumstances of the instant case. The conduct by Appellant and complained of by Respondents is no more egregious than that in case law cited by Respondents and in which no attorneys' fees are awarded. Such an award in the instant case is unprecedented and denies Appellant's constitutional right to fair and equal treatment before the law.

Further, as argued in the point below Appellant brought the instant case based on law and the explicit ruling of the courts in McKoan.

2. Legislated Law vs. Court Created Precept: CPLR 205 (a) v. Res Judicata

a. The Instant Complaint Is Permitted Under Law And

Based On The Explicit Rulings of the Courts In McKoan

This argument was originally placed before the courts below as a separate point (as "Argument Point III: COMPLAINT PERMITTED UNDER LEGISLATED LAW") and while its placement here breaks the flow of argument, it is purposely placed here because of its importance. The arguments here establish that Appellant acted in goqd faith in the proceedings below, on the basis of explicit rulings by the courts below and on the basis of law provided under CPLR 205 (a).

Its also raises to the Court the unresolved conflict between the court created principle of *res judicata* and the legislated law in CPLR 205 (a).

The arguments here were made before the trial court in motions after trial requesting the trial court to vacate or set aside its decision of June 3. The arguments under Argument Points II, III (same), IV and V were also put before the trial court as basis for reversing its decision. The trial court refused to change its ruling. They are presented to the Court as further basis for granting relief to Appellant.

The IAS court cited no law in support of its decision to deny Appellant's claims. The appellate court ostensibly sided with Respondents arguments that the court created precept of *res judicata* barred Appellant claims, the court citing only law which denied claims based on res judicata: Sud v. Sud, 227 A.D. 2d 319, 642 N.Y.S. 2d 893 (1st Dep't 1996); Corto v. Lefrak, 203 A.D. 2d 94, 610 N.Y.S. 2d 214 (1st Dep't 1994); Couri v. Westchester Country Club, 186 A.D.2d 715, 589 N.Y.S.2d 494 (2d Dep't 1992)). Neither court relied on Respondents' argument that Appellant claims were barred by the court created precepts of collateral estoppel and the rule against claim splitting. Res judicata does not bar the instant complaint because (1) the complaint is based on "facts" and not the "conclusory and unsubstantiated allegations" and "bare legal

conclusions" plead in McKoan (2) the complaint is based on facts not stated in McKoan (3) the complaint is based on facts not decided against Appellant or left undetermined in McKoan (4) based on facts that Appellant has only learned to express since the filing of the complaint in McKoan (Appellant expressed "conclusory and unsubstantiated allegations" and "bare legal conclusions" in McKoan and states "facts" in the instant complaint).

Under the law established by the legislature under CPLR 205(a):

> "If an action is timely commenced and is terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences [emphasis added] within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within such six-month period."

The explicit language of CPLR 205(a) permits the instant complaint even if the facts in the instant complaint are the same facts as in McKoan (*See* Point III (B)). In McKoan there was no voluntary discontinuance, no failure to obtain personal jurisdiction and no dismissal for neglect to prosecute. McKoan was dismissed for facial insufficiency. There was no judgment on the merits, the courts in McKoan having explicitly instructed Appellant in their rulings in McKoan that a dismissal

for legal insufficiency is not an adjudication on the merits (R.671, par. 7). And the instant action was commenced and service made within six-month period prior to the exhaustion of the appeals process.

The courts denied Appellant's appeal based not on legislated law but on court created rule: res judicata, the courts ruling that the facts in the instant case are the "same facts" as in McKoan. This ruling was a reversal (without notice) of the courts' earlier rulings in McKoan where they found Appellant had failed to plead "facts" to support his 2 causes of action bit had only plead "conclusory and unsubstantiated allegations" and "bare legal conclusions". Respectfully, res judicata is not legislated law and res judicata (court created rules) are not superior to legislated law. Said conflict between the superiority of legislated law to court created precept is before the Court. Respectfully, making laws is beyond the constitutional authority of the courts. The courts are not empowered to make law or to circumvent or rewrite law by creating rules that violate the explicit intent of legislated law. The courts in the instant case use res judicata to defeat legislated law under CPLR 205 (a). This they may not do.

No case law precedent is cited by the courts or Respondents where a defense is based on CPLR 205(a) is defeated by res judicata. There is no mention of CPLR 205(a) and any of the citations by Respondents or the appellate court (the IAS court did not specifically mention res judicata nor did it cite any case law in its decision). The question here (CPLR 205 (a) vs. res judicata) presents a case of first impression.

In the instant complaint the courts and Respondents reversed the arguments they made in McKoan arguing that a dismissal for facial insufficiency is a decision of the merits. In McKoan Respondents argued -- and the courts held -- the opposite position: that a dismissal for facial insufficiency is not a decision on the merits. The courts did not reach that question

in the instant complaint. The implicit findings in the ruling of the court in the instant complaint and Respondents current arguments are in conflict with the explicit rulings of the courts in McKoan (and Respondents arguments in McKoan): a dismissal for facial insufficiency is not a decision on the merits. Neither the courts nor Respondents cite any case law in which these conflicts are mentioned much less resolved warranting review by the Court.

The Court must also review the explicit conflict between CPLR 205 (a) and CPLR 3211(5), Respondents and the courts relying on res judicata to deny Appellant his rights to due process . CPLR 3211 (5) reads:

> the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;

The language of CPLR 3211 (5) is in explicit conflict with CPLR 205 (a).

Respondents also argue that the termination date of the McKoan action was the date the appellate court made its decision and not the dated the appeals process concluded citing Dinerman v. Sutton, 45 Misc.2d 791, 792, 258 N.Y.S.2d 13, 15 (Sup. Ct. , Queens 1965) and Cohoes Hous. Auth. v. Ippolito-Lutz, Inc., 65 A.D. 2d 666, 666-67, 409 N.Y.S.2d 811, 812 (3rd Dep't 1978) aff'd, 49 N.Y.2d 961, 428 N.Y.S.2d 948 (1980). The IAS and appellate courts did not reach that question in the proceedings below. Such a decision is arbitrary and capricious; and counter to the intent of the appeals process; places the courts in the position of creating unnecessary and unwarranted prejudice against the litigants and the courts; in conflict with the court principle of judicial economy; in conflict with precedent; and denies Appellant his constitutional and

statutory rights to due process and fair and equal treatment before the law.

Any holding that the start of the 6 month termination period under CPLR 205 (a) begins with any date other than the date the appeals process is exhausted places the courts in the position of acting prejudicial by forcing potentially unnecessary litigation on the courts, the Appellant and Respondents. Appellant must file a second action in order to preserve his rights under CPLR 205(a) while appealing the decision in the first case. The time of the courts is consumed with a second action on the same facts while such action may be unnecessary if Appellant succeeds on appeal. The Appellant has prejudice forced on him by the courts in the form of the expense and burden of commencing a second action under CPLR 205 (a) while simultaneously appealing the decisions in the first case. Respondents are faced with the same prejudice having to respond to the second complaint while responding to the appeals in the first.

Any holding that the start of the 6 month termination period under CPLR 205 (a) begins with any date other than the date the appeals process is exhausted is in conflict with the courts principles of judicial economy and wasteful of judicial resources. Said conflict is obvious for the reasons stated in the previous paragraph: the litigants and the courts are involved in a second suit on the same basis as that of the first which may become unnecessary if Appellant succeeds on his appeal.

Forcing such prejudice on the courts and litigants brings up for review by the Court of Appeals the conflict between CPLR 205 (a) and CPLR 3211 (4). CPLR 3211 (4) permits as grounds for moving for dismissal similar pending litigation. CPLR 3211 (4) reads:

> there is another action pending between the same parties for the same cause of action in a court of any

state or the United States; the court need not dismiss upon this ground but may make such order as justice requires;

The case law cited by Respondents is in conflict with other case law warranting review by the Court. *See* Maki v. Grenda (4th Dept. 1996) 224 A.D.2d 996, 637 N.Y.S.2d 553 (termination of prior action commences with exhaustion of administrative remedies); Isham Broadway Pharmacy, Inc. v. Perales, 1991, 152 Misc.2d 210, 575 N.Y.S.2d 646 (pharmacy brought action within six months of federal Court of Appeals decision). *See* also practice commentaries under CPLR 205(a) and Carven Associates v. American Home Assur. Corp., (1st Dep't. 1991) 173 A.D.2d 369, 569 N.Y.S.2d 738 (extension due to failure to comply with court ordered discovery).

The argument that the start of the 6 month termination period under CPLR 205 (a) begins with the date the appeals process concludes is (1) sensible, (2) appears obvious, and (3) is consistent with the principles of (a) judicial economy, (b) the prohibition against the courts acting with unwarranted and unnecessary prejudice, and (c) the purpose and intent of the of the appeals process. Said conflicts and arguments are before the Court on this application.

b. The Instant Complaint v. McKoan: (1) "Facts" And Not "conclusory and unsubstantiated allegations" Or "bare legal conclusions" (2) Claims Not Raised Or Determined (3) Facts Not Raised or Determined (4) Claims And Facts That Could Not Have Been Raised

1. "Facts" And Not "conclusory and unsubstantiated allegations" Or "bare legal conclusions"

In McKoan, Respondents explicitly and repeatedly argued before the courts that Appellant had plead only conclusions and not facts to support his claims. As Respondents argued, the difference between conclusions and facts is not one of semantics but one of substance since under law conclusions are insufficient to support a claim (while facts, if disputed, are for a jury to decide). The courts in McKoan explicitly ruled (and sided with Respondents arguments) that Appellant claims were based on "conclusory and unsubstantiated allegations" and "bare legal conclusions" and the courts relied on the same law cited by Respondents to dismiss Appellant's complaint for facial insufficiency.

In General Electric the courts explicitly found - and Respondents explicitly argued - that Appellant had plead "facts" to support his claims.

Here the differences between the complaints in McKoan and General Electric are clear and stated in the explicit rulings of the courts (and the explicit arguments of Respondents): the Complaint in General Electric pleads "facts" while the complaint in McKoan pled "conclusory and unsubstantiated allegations" and "bare legal conclusions". And as Respondents argued in McKoan, the difference between "facts" and "conclusions" is not one of semantics but one of law: conclusions (or "bare legal conclusions" as the appellate court ruled) do not provide a legal basis for a cause of action while "facts" do provide a legal basis for a cause of action. Respondents do not deny the explicit rulings cited or that Respondents made said arguments before the courts.

The courts in General Electric reversed without notice their earlier findings in McKoan (that Appellant in McKoan had failed to plead facts to support his claims but had only plead "conclusory and unsubstantiated allegations" and "bare legal conclusions"). As argued under Argument Point V (A), such a reversal without notice denied Appellant's rights to due process.

2. Claims Not Raised Or Determined Against Appellant

In McKoan, Respondents argued that Appellant had attempted to plead only 2 causes of action: emotional distress and malicious prosecution under tort law. The courts in McKoan ruled in concurrence with Respondents arguments finding that Appellant had attempted to plead only 2 causes of action - emotional distress and malicious prosecution under tort law - and that Appellant had failed to plead facts to support said causes of action, Appellant having plead "conclusory and unsubstantiated allegations" and "bare legal conclusions" rather than facts (R.668; R.677).

Appellant's argument that any causes of action other than emotional distress and malicious prosecution under tort law were unplead in McKoan are established by basing his claim on (1) the explicit rulings of the courts which contain only review of causes of action for emotional distress and malicious prosecution under tort law (2) Respondents own arguments in McKoan that (a) Appellant plead or attempted to plead only 2 causes of action: emotional distress and malicious prosecution under tort law, (b) that any other claims were unplead, unpreserved, or dehors the record and (c) Respondents arguments in McKoan that the courts recognized and ruled on only the causes of action for emotional distress and malicious prosecution under tort law.

If, arguendo, any issues were determined in McKoan against Appellant - which they were not - the determinations were obvious error and a violation of Appellant's due process rights (5th and 14th Amendment) (*See* Argument Point II (G); *See* also Argument Point II (C)).

Appellant may also bring the same claims for emotional distress and malicious prosecution plead in McKoan - as well as any claims Respondents now allege were plead in McKoan - in

the instant complaint under law established by the legislature of the State of New York under CPLR 205 (a). CPLR 205 (a) provides:

> "If an action is timely commenced and is terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences [emphasis added] within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within such six-month period."

See **Argument Point I (2) (a)** for discussion of the conflict of law between CPLR 205 (a) and case law cited by Respondents.

3. Facts Not Raised Or Determined Against Appellant

The "facts" in the instant complaint are not the same as the "conclusory and unsubstantiated allegations" and "bare legal conclusions" plead in McKoan.

Based on the explicit findings of the courts in General Electric and McKoan - "facts" were plead in General Electric while no facts but "conclusory and unsubstantiated allegations" and "bare legal conclusions" were plead in McKoan (see previous point) - no "facts" determinative of any of the issues found in General Electric can be argued as having been plead McKoan. And, as Respondents argued in McKoan, the

difference between "facts" supporting a claim as opposed to "conclusions" supporting a claim is not s difference of semantics, but the difference between stating a cause of action and not stating a causes of action - between a court sustaining a complaint or dismissing a complaint. Respondents do not deny that they made the identical or at least similar argument in McKoan.

The facts (no, the "bare legal conclusions") determinative of the issues in McKoan were disputed. If, arguendo, any of the facts determinative of the issues in McKoan were decided McKoan - and decided against Appellant - then such decisions was made as a matter of law, without notice and in violation of Appellant's federal rights to due process and fair and equal treatment before the law and obvious error: the courts having violated CPLR 3211 and CPLR 3212 (summary judgments without notice) and the courts having violated appellants rights under the state constitution to have disputed issues of facts decided by a jury. (*See* Argument Points II (D) (2) for CPLR 3211 and 3212; *See* Argument Point II (C) for jury decision on disputed facts).

If, arguendo, facts in the instant complaint are found to be the same facts (nee "bare legal conclusions") plead in McKoan Appellant may plead the same facts plead again in General Electric under law established by the legislature of the State of New York under CPLR 205 (a) (*See* Argument Point I (2) (a)).

The allegations in the Complaint speak for themselves. Appellant begs the Court for a full and fair hearing of the facts to see whether they state any cause of action cognizable at law, whether or not Appellant is capable of identifying such cause of action (R.615-667).

4. Claims And Facts That Could Not Have Been Raised

Respondents claim that Appellant could have raised the facts and claims made in the instant complaint in Appellant's pro se proposed 2nd amended complaint in McKoan. This argument is frivolous. Appellant is not a lawyer, has no legal training and lacked sufficient knowledge, understanding and experience as to necessary pleading requirements.

B. Proceedings To Determine The Exact Dollar Amount Of The Award Of Attorneys' Fees And The Award Itself Were Unlawful

1. The Trial Court Had No Jurisdiction Over Appellant:

a. The Order Of The IAS Court Was Legally Insufficient For The Purposes of Investing Jurisdiction To The Trial Court And Legally Insufficient For The Making Of Such An Award.

Appellant argued in the courts below that Respondents were awarded their attorneys' fees in the default orders issued by the IAS court July 14, 1997 (R.24, R.877) and the order of the IAS court on September 16, 1997 (R.17). Respondents argued in the courts below and stated during the proceedings at trial that the award of attorneys' fees was made by the October 22, 1997[9] of the IAS Court (*See* R.1258-1260). In either case 1997 law and not 1998 law is applicable. Respondents misled the courts in the proceedings below by citing the 1998 revision

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[9]See statement to the trial court by Respondents' attorney Michael E. Gerber explaining reason for the matter before the trial court (R.83 [P.2L.5]): "For a determination of the amount of attorneys' of attorneys' fees, attorneys' fee having been awarded to the defendants by Justice Wilk by an order of October 22, 1997."

of 22 N.Y.C.R.R. 130-1.2 as controlling law on the 1997 decisions. This is a patently false assertion by Respondents. The 1997 decisions are subject to 1997 law. The 1997 revision of 22 N.Y.C.R.R. 130-1.2 reads:

> "The court may make an award of costs or impose sanctions or both upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate . . . . . In no event shall the total costs awarded and sanctions imposed exceed $10,000 in any action or proceeding."

The 1997 orders, decisions or judgments referenced above (R.17, R.24, R.877, R.1258) are legally insufficient for an award of attorneys' fee and legally insufficient as the basis for the proceedings to determine the exact dollar amount of such an award.

Not one of the 1997 orders, decisions or judgments referenced above satisfies the strict and explicit legal requirements necessary under the 1997 revision of 22 N.Y.C.R.R. 130-1.2 for the award of attorneys' fees ("costs") or as necessary to for the basis for proceedings to determine the amount of such an award. The IAS court rulings referred to above fail to satisfy any of these strict legal requirements. The award of attorneys' fees -- and the proceedings to determine the exact dollar amount of the award -- based on said 1997 rulings violates law and denies Appellant his rights to (1) substantial and procedural due process and (2) fair and equal treatment before the law. Under the 1997 revision of 22 N.Y.C.R.R. Chapter 130-1.2 -- the only law under which the IAS court could make an award of attorneys' fees, the IAS court must satisfy 4 conditions and limit its award to a $10,000 maximum: (1) the court must in a written decision specifically and explicitly label as "frivolous" conduct by the Appellant, (2) the

court must in said written decision specifically and explicitly state the exact conduct the court labeled as "frivolous", (3) the court must in said written decision specifically and explicitly state the reasons why, under the specific circumstances of the instant case, the court found the specific conduct labeled and complained of as "frivolous" to be such, and (4) the court must state in said written decision specifically and explicitly the reasons why the court found the amount awarded to be appropriate; further, in no event can the amount awarded for attorneys' fees exceed $10,000 in any action or proceeding. All these conditions are absent from the 1997 rulings of the IAS court. The IAS court never labeled Appellant's conduct as "frivolous" in any written decision, never set forth in a written decision reasons why, under the specific circumstances of the instant case, the court found the specific conduct labeled and complained of as "frivolous" to be such (and no conduct by Appellant was labeled or complained of as "frivolous" by the IAS court) and the IAS court never set forth in a written decision reasons why the amount awarded (attorneys' fees not to be in excess of $10,000 under law) to be appropriate, in fact, there is no discussion whatsoever by the IAS court about such an award or the propriety of such an award just as there is no labeling of any conduct by Appellant as "frivolous", nor any specification of "frivolous" conduct nor any reasons given why, under the circumstances of the instant case, such unlabeled and unspecified conduct is deemed frivolous. The only "claims" of "frivolous" conduct were made by the Respondents, and never by the IAS court.

Further, while Respondents' alleged Appellant's Complaint to be "frivolous" before the IAS court they did an about turn at the trial had to determine the exact dollar amount of the award. At trial, Respondents reversed their claim that Appellant's Complaint was frivolous and argued to the trial court that the Complaint presented novel questions and substantial questions of law and that said substantial and novel questions were of such magnitude that said attorneys required

weeks of dedicated legal expertise and research (purportedly valued at $76,863.31) in order to defeat Appellant's claims.

b. No Judgment In Evidence As Required Under 22 N.Y.C.R.R. 130-1.2

The law on award of attorneys' fees -- and the proceedings to determine the exact amount of the award -- requires that the award (made October 22, 1997 according to Respondents) "be entered as a judgment of the court" (22 N.Y.C.R.R. 130-1.2, 1997 and 1998 revisions). No such judgment or entry of such judgment is in evidence at the trial. The absence of such judgment requires the Court to vacate the June 3, 1998 Judgment.

2. Setting The Exact Dollar Amount Of Award of Attorneys' Fees In Excess Of 1997 $10,000 Limit Unlawful

Assuming, arguendo, the IAS court order was either appropriate under the circumstances of the instant case (which it was not) or legally sufficient (which it was not) to either (1) to give jurisdiction to the trial court or to any court to set the exact dollar amount of the award or (2) to make an award Respondents attorneys' fees, the maximum legal amount of the award would be limited to $10,000: "In no event shall the total costs awarded and sanctions imposed exceed $10,000 in any action or proceeding." (*See* 1997 revision of 22 N.Y.C.R.R. 130-1.2 as quoted in the previous section). The IAS court made the award of attorneys' fees in 1997. Respondents have admitted that the attorneys' fee award was made by the IAS court in 1997 and not by the trial court in 1998. The trial court (Hon. Robert D. Lippmann) stated in the records of the proceedings that it (the trial court, Hon. Robert D. Lippmann) did not make the award of attorneys' fees but that the award of attorneys' fees was made by the IAS court in 1997. The law in

effect at the time the award was made limited the award to a maximum of $10,000. Any amount in excess of $10,000 is a violation of the law in effect at the time the award was made. The $60,000 award of Respondents attorneys' fees is unlawful. The setting the amount of said award at $60,000 denied Appellant his federal constitutional rights to (1) fair and equal treatment before the law (14th Amendment) and (2) his right to substantial and procedural due process (14th and 5th Amendments), among other rights and legal protections.

3. Reversal Warranted As A Full And Fair Hearing At Trial Was Denied Appellant As a Result Of Perjury And Other Misconduct By Respondents: Assertions Of Material Factual Statements That Are False; Conduct Involving Dishonesty, Fraud, Deceit And Misrepresentation; And Conduct Prejudicial To The Administration Of Justice

a. Fees Associated With Respondents' Res Judicata Motion Were Procured By Perjured Testimony

The fees claimed in association with the Respondents' *res judicata* motion (April Motion) were procured on the basis of material factual statements that were false. In the proceedings before the trial court -- and in rebuttal to Appellant's counsel's attempts to establish Respondents' attorneys' work in General Electric was duplicative of the same work already done by the same law firm in McKoan, Joel M. Miller ("Miller"), attorney and senior partner with Miller & Wrubel P.C., (the law firm representing Respondents) and Michael E. Gerber ("Gerber"), an attorney and an associate with Miller & Wrubel testified that the General Electric Complaint was based on new and numerous causes of action not contained in the McKoan. Attorneys Miller and Gerber argued and testified under oath that no reduction in the amount of

attorneys' fees was justified based on Appellants' counsel's claims that much of the work in both cases was essentially the same. The trial court was swayed by Respondents' trial statements, accepting attorneys Miller's and Gerber's sworn testimony that 15, 16 or 17 new causes of action were plead in General Electric, that said 15, 16 or 17 new causes of action were so novel and substantial that they required weeks of dedicated legal expertise and research by Respondents' attorneys (purportedly valued at $76,863.31) and allowing for no reduction in the amount of attorneys' fees demanded by Respondents based on the duplication of work in the two cases. Citing from the record of the proceedings at trial:

commencing at R.226 (P.145L.25) (the sworn testimony of Joel M. Miller, attorney and senior partner at Miller & Wrubel):

> THE COURT: You say the same factual allegations. What difference, if any, between Kliebert 1[10] and Kliebert 2?
>
> [MILLER]: Kliebert 1 had two claims, intentional infliction of emotional distress and malicious prosecution. Kliebert 2 had, substantially the same factual allegations, although there was some additional ones, and 19 causes of action.
>
> THE COURT: Were some of them related.
>
> [MILLER]: Including, I believe, two that I named.
>
> THE COURT: Plus 17 others?

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[10]"Kliebert 1" refers to the McKoan action; "Kliebert 2" refers to the General Electric action.

[MILLER]: Yes, without looking, I can't verify the exact 17, but yes, there were many additional causes of action based upon the same facts.

commencing at R.340 (P.259L.17) (the sworn testimony of Michael E. Gerber, attorney and associate in the law firm of Miller & Wrubel):

THE COURT: Sustained. We have been through this. There were similarities, but there are 15 or 16 additional courses of action.

MR. ROSENKRANTZ: But that is the point.

THE COURT: What point? How many times do you want to hear them say they were similar, but there were additional parties, there were 16 additional causes of action.

MR. ROSENKRANTZ: But that is the point.

THE COURT: Sir, ask a question.

MR. ROSENKRANTZ: How many causes of action were there in the first complaint?

THE COURT: Best of your recollection?

[GERBER]: You're now showing me the complaint in the current action?

MR. ROSENKRANTZ: I don't want to do that.

THE COURT: Do you recall how many were in the first cause of action?

[GERBER]: In the first case -- well, actually there was several complaints. So the amended complaint which

was prepared by Mr. Rosenkrantz and was dismissed by Justice Wilk contained the original cause of action for malicious prosecution, intentional infliction of emotional distress and breach of contract which the plaintiff dropped, and conspiracy, which I think plaintiff also dropped, because I'm certain --

THE COURT: So those weren't causes of action in the first action?

[GERBER]: Yes.

THE COURT: And how many are there -- were there in the case currently pending?

[GERBER]: 19, your Honor.

THE COURT: Thank you.

MR. ROSENKRANTZ: There were five in the previous case?

THE COURT: I think he said four but --

[GERBER]: No, depends how you count it because that is what the court ultimately ruled on. There were two.

MR. ROSENKRANTZ: But they started out in that amended complaint with five?

[GERBER]: Started out there was a complaint before the amended complaint and then proposed to further amend his complaint.

THE COURT: But it was down to two.

[GERBER]: Really two, yes.

> THE COURT: How many times do you want to hear them say it. Mr. Miller said it twice. Mr. Gerber has said it at least once, if not twice also.

This testimony by Respondents' attorneys impeaches the sworn testimony of attorney Michael E. Gerber and central basis put forth by Respondents in the proceedings before the courts below: that the causes of action (and facts) in both actions are identical or essentially identical. In sworn testimony and court papers signed by attorneys Miller and Gerber, Respondents state that the causes of action claimed in McKoan (1994) are "substantially the same as" those in General Electric (1996); that General Electric (1996) alleges "the very [same] claims, on the basis of the same facts . . . [as alleged] in the 1994 [McKoan] Action"; and that General Electric (1996) is "based on the same underlying facts, and raising essentially identical claims . . . [as] in the 1994 [McKoan] Action" (emphasis added) (*See* 4/18/97 Sworn affidavit of attorney Michael E. Gerber at R.543 par. 5, R.547 par.10 and R.545 par. 7, respectively). The same statements are repeated over and over in all papers put before the courts below by Respondents. Citing, for example, from Respondents' Memorandum of Law in Support of Defendants' Motion to Dismiss and for Sanctions Against Plaintiff (Trial Exhibit 8, R.485):

> Referring to all of the claims in the General Electric complaint:
>
> "This action [1996 General Electric] must be dismissed because it is based on the same alleged facts and raises essentially identical causes of action [as] . . . in the 1994 [McKoan] Action" (emphasis added) (R.574 at 50).
>
> Referring to the Prima Facie Tort Claims:

--"The [1996 General Electric] prima facie tort claims (5th and 6th causes of action) . . . are essentially the same as the prima facie tort claims [alleged] . . . in the1994 Action".

--"The . . . prima facie torts (1st, 2nd, and 3rd causes of action) are essentially the same . . . [as] the emotional distress, malicious prosecution and prima facie tort claims, in the 1994 [McKoan] Action" (R.556 at 55).

--"The . . . [1996 General Electric] prima facie tort [claim] and . . . [the] 42 U.S.C. Chapter 1985 [claim] (4th and 16th causes of action) are the same as "the malicious prosecution and prima facie tort claims . . . and the conspiracy claim" in that [1994 McKoan] Action" (R.576 at 56).

Referring to the Privacy Claims:

--"The [1996 General Electric] privacy claims (7th and 14th causes of action) . . . are essentially the same as the privacy claims [alleged] . . . in the 1994 action" (R577 at 58).

R578 at 59 "The [1996] conversion claim (8th cause of action) . . . is the same as the conversion claim . . . in the 1994 [McKoan] Action" (R.578 at 59).

Referring to the Contract Claims:

--"The [1996 General Electric] 11th cause of action, claiming breach of contract . . . the same claim . . . [as] in the 1994 [McKoan] Action" (R.559 at 62).

Referring to the False Arrest and False Imprisonment Claims:

--"The [1996 General Electric] false arrest and false imprisonment claims . . . (12th cause of action) . . . are essentially the same as the false arrest and imprisonment claims . . . in the 1994 [McKoan] Action" (R.580 at 63).

Referring to the Malicious Prosecution Claims:

--"The [1996 General Electric] malicious prosecution claim . . . is essentially the same as the malicious prosecution claims . . . in the 1994 [McKoan] Action" (R.580 at 64).

Referring to the Abuse of Process Claims

--"The [1996 General Electric] abuse of process claim . . . is essentially the same as the abuse of process claim . . . in the 1994 [McKoan] Action" (R.580 at 65).

Referring to the Defamation Claims:

--" The [1996 General Electric] defamation claim . . . is essentially the same as the defamation claim . . . in the 1994 [McKoan] Action" (R.581 at 66).

Referring to the Constitutional Violations Claims:

--"The [1996 General Electric] constitutional violations claim (18th cause of action) is . . . the same claim . . . rejected in the 1994 [McKoan] Action" (R.581 at 67).

Referring to the Emotional Distress Claims:

--"The [1996 General Electric] emotional distress claim . . . is essentially the same as the emotional distress and malicious prosecutions claims . . . in the 1994 [McKoan] Action" (R.581 at 68).

Thus, Respondents by their attorneys Miller and Gerber stated that each and every claim in 1996 General Electric Complaint (other than the 9th & 10th [breach of fiduciary, and breach of fiduciary and implied contract, respectively], and the implicit causes of action for assault and negligence]) was plead in the 1994 McKoan action and the each and every cause of action in the 1996 General Electric Complaint was the same or the essentially identical cause of action plead in the 1994 McKoan action (other than the 9th & 10th; and the implicit causes of action for assault and negligence). Respondents make no mention of the implicit causes of action for assault and negligence in the underlying proceedings.

Respondents sworn statements constitute fraud, misrepresentation and misconduct under CPLR 5015 (a) (3) and under Part 1200 Disciplinary Rules of the Code of Professional Responsibility and provided the trial court and the appellate court with the basis for the providing Appellant with all or part of the relief he requested, and in particular Appellant's requests that the trial court vacate the decision, order and judgment setting the amount of the award of attorneys' fees at $60,000 and that the appellate court vacate its initial decision affirming the award. See, eg., Oppenheimer v. Westcott, 47 N.Y.2d 595, 604, 419 N.Y.S.2D 908, 912 (1979) (vacating judgment on grounds of misconduct by plaintiff in failing to reveal material facts; Prote Contracting Co. v. Board of Educ., 230 A.D.2d 32, 39-40, 657 N.Y.S.2d 158, 162-63 (1st Dep't 1997) (vacating judgment on ground that witness had been bribed).

CPLR 5015 is entitled "Relief from judgment or order." Section 5015 (a) (3) reads:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: .... ;

3. fraud, misrepresentation, or other misconduct of an adverse party;

Part 1200 Disciplinary Rules of the Code of Professional Responsibility states under Chapter 1200.3:

Chapter 1200.3 Misconduct.
(a) A Lawyer shall not:
(1) Violate a disciplinary rule.
(2) Circumvent disciplinary rules through the actions of another.
(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. [emphasis added]
(5) Engage in conduct that is prejudicial to the administration of justice [emphasis added].
(6) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

and under Chapter 1200.1 (i):

Chapter 1200.1. Definitions

(i) *Fraud* does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another [emphasis added].

The provisions of CPLR 5015 (a) (3) and of Part 1200 Disciplinary Rules of the Code of Professional Responsibility

provided the basis for vacating June 3, 1998 decision of the trial court and the January 18, 2000 decision of the appellate court.

Respondents' misconduct here is sanctionable under provisions of 22 N.Y.C.R.R. Chapter 130-1.1 (c) revised 1998 defining sanctionable conduct as:

> (c) For Purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law [fact] and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [or]
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another[.]; *or*
>
> *(3) it asserts material factual statements that are false*[11]. [emphasis added]
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken is frivolous, the court shall consider among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, [or] should have been apparent [to counsel], *or was brought to the attention of counsel or the party. (Subsection (c) chgd by AO/783/97, eff. 3/1/98. Matter in brackets eff. only until 3/1/98. Matter in italics eff. 3/1/98.)*

[11]Portions in italics appear so in the original.

Respondents have been confronted with these claims of misconduct by Appellant in the proceedings in the courts below. Respondents, however, have never denied that the decisions, orders and judgments granted in Respondents favor were procured on the basis of the lies Respondents' attorneys told while under oath. Respondents only reply to these charges has been has been an attempt to obscure their misconduct by mislabeling sworn testimony as "litigation positions". Respondents' indignant and embarrassed pleas notwithstanding, Appellant's claims here and in the proceedings heretofore are not that Respondents' "litigation positions" (legal arguments) are "inconsistent" (inconsistent?) with "the [sworn] testimony of their attorneys at the Hearing" nor does Appellant claim that Respondents' "claimed inconsistency [emphasis added] did not result in the Attorneys' Fees" award, but that Respondents' attorneys lied while under oath and obstructed justice. Let me repeat that: Appellant's claim is that Respondents' attorneys perjured themselves by lying while under oath and that Respondents' attorneys withheld from the courts evidence in their possession which was material and necessary and that the decisions, orders and judgments granted in Respondents' favor were procured on the basis of the lies Respondents' attorneys told while under oath and by Respondents' willful, wanton and calculated withholding of material and necessary evidence. (*See* generally Argument Point I); *see* also FACTS AND PROCEDURAL HISTORY).

As calculated below, Respondents claimed $35,082 or 179.5 hours in work associated with the res judicata motion. Another $9,578 or 48.6 hours for work associated with reviewing and responding to Appellant's opposition papers. For all the reasons stated above, it was improper for the trial court not to disallow these amounts.

Identifiable Work Associated With The *res judicata* Motion (Total 179.5 Hours Or $35,082):

Amounts from Defendants 1 (R.1273-1311) (Client Statement Report And Invoices)

Page In Record	Invoice Date	Amount of Total Legal Fee Applicable To *Res Judicata* Motion
R.1245-1276	2/18/97	$471 $471 (all) of this total represents entries indicating other work was also done. Total for Miller $175 for .5hr: (JMM[12]): 1/20/97 .5hr*[13] $175*. Total for Gerber 1.6 hr $296: (MEG) 1/20/97 1.6hr*.
R.1277-1279	3/12/97	$55 $55 (all) of this total represents entries indicating other work was also done. Total for Gerber .3 hr* $55*: (MEG) 2/24/97 .3hr*
R1280-1283	4/9/97	$8,070 $6270 of this total represents entries indicating other work was also done. Total for Miller $150 for .4hr: (JMM): 3/3/97 .4hr* $150*. Total for

[12]'JMM' refers to Joel M. Miller; "MEG" refers to Michael E. Gerber.

[13]The asterisk after an entry for time indicates that the time claimed also included work. Miller and Gerber stated to the trial court that they could not differentiate the amount of time stated for various different activities stated on the invoices and "record"(s) attached to Defendants' 1 and that no documents as to these records existed.

		Gerber 39.6 hr $7920 of which 9 hrs or $1800 for work exclusive to *res judicata* and 30.6 hrs or $6120 represents entries which indicated other work was also done: 3/3/97 3.7hr*, 3/4/97 .3hr*, 3/9/97 4hr*, 3/10/97 1hr, 3/11/97 8hr, 3/12/97 7hr*, 3/13/97 1.7hr*, 3/14/97 1.3hr*, 3/28/97 4hr*, 3/31/97 8.6hr*
R.1284-1287	5/13/97	$26,486 All of the time here (137.1 hrs) represents the *res judicata* motion 42.4

b. Fees Subsequent To The July 10, 1997 Motion Call Were Procured By Respondents' Calculated Efforts To Obstruct Justice

It was improper for the trial court to include in the amount awarded Respondents the legal work claimed on Respondents' Client Statement Report (R.1273) on and after July 10, 1997 which resulted solely from Respondents' efforts to burden Appellant and to obstruct justice. Respondents withheld from the courts (the IAS court, the trial court, the First Department and the Court of Appeals) their knowledge that there was no default on the *res judicata* motion (April Motion). Respondents knew that Appellant had indeed filed his opposition papers. Respondents knew that Appellant's process server had answered the call on July 10, 1997 and presented Appellant's opposition papers to the court. Answering the call for Respondents was Corinne J. Parker[14], an employee of Miller

[14]Ms. Parker appears as "CJP" on entries on the "record"(s) attached to the invoices.

& Wrubel who in response to the motion call filed Respondents' motions for dismissal and filed Respondents' reply papers to Appellant's opposition.[15] Ms. Parker witnessed service of Appellant's papers on the court by Appellant's process server (R.1292, entry for CJP dated 7/10/97). Parker then informed Gerber of the facts surrounding the appearances at the calendar call (R.1292 entry for MEG dated 7/10/97). Gerber later discussed the results of the calendar call with Miller (R.1292 entry for MEG dated 7/22/97 and entry for JMM dated 7/23/97). However, neither Respondents nor Respondents' attorneys nor the attorneys' employees (Miller & Wrubel, Miller, Gerber, or Parker, respectively) have ever come forward with the evidence in their possession that Appellant answered the call and filed papers at the call. Nor have said persons ever denied these facts or come forward with the truth when confronted by Appellant in the proceedings heretofore. Mr. Gerber continued this misconduct before the trial court, stating before the trial court (R.391[P.310L.2]): "In addition, many of the legal services that defendants' counsel were *forced* [emphasis added] to perform were brought upon by plaintiff himself in defaulting on the motion which thereby led to our having to oppose the motion to vacate the default . . . ." [emphasis added]

The IAS court stated that no opposition papers could be found by the Clerk of the Supreme Court (IAS Court). The IAS court granted Respondents' *res judicata* motion (April Motion) on this disputed and alleged default (R.24). Rather than come forward with the truth, Respondents chose to force on Appellant subsequent proceedings to establish that no default

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[15]Respondents claimed $9,578 in fees relative to work performed in reviewing Appellant's opposition papers and reseaching and drafting their reply papers which were lost by the Clerk of the Court and the basis of the default judgment.

had occurred. All of the proceedings[16] subsequent to Parker's attendance at the 7/10/97 were necessitated by Respondent's misconduct. Rather then tell the truth, Respondents chose to force proceedings to vacate the default, choosing to respond to the motions (orders to show cause) rather than tell the truth. Appellant was not aware that Respondents had withheld this crucial information from the courts nor that Respondents were responsible for unnecessary judicial proceeding as a result of this misconduct until receipt of the transcript in 1999 (the *res judicata* proceedings took place before the IAS court below in 1997).

To begin to understand the full extent of Respondents' misconduct -- misconduct that brought upon the subsequent proceedings -- the Court is directed to sections of Defendants 1 cited below (R.1273-1311). The abbreviations refer to the following: MEG for Gerber, CJP for Corinne J. Parker, KAA for Kimberly A Axelrod, and JMM for Joel M. Miller.

07/8/97 MEG Att'n to service of motion to dismiss reply brief and filing of same. 0.20

07/9/97 MEG Conf. w/CJP re: filing motion to dismiss reply on 7/10/97. 0.10

07/10/97 CJP attended calendar call at State Supreme Court. [emphasis added] *2.00*

07/10/97 KAA Updated and maintained chronology files; indexed and updated court documents. 0.30

07/10/97 MEG Conf. w/CJP re: calendar call of motion to dismiss and filing of reply *0.50*

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[16]As calculated under the previous point, Respondents claimed a total of 179.5 hours and $35,082 for work associated with the *res judicata* motion.

memo;drafting client ltrs. re: plaintiff opposition and defendants' reply on motion to dismiss. [emphasis added]

07/21/97 MEG T/c w/J. Wilk's chambers re: decision 0.10
reported by NYLJ computer: conf. w/CJP
re: same.

07/22/97 KAA Retrieved orders from Motion Support 0.60
Office in State Supreme Court.

07/22/97 MEG Reviewing default decisions: conf. 2.50 w/JMM re: same; drafting ltr. to plaintiff re: same: drafting notice of settlement and proposed order for LaFergola motion to dismiss. [emphasis added]

07/23/97 JMM Conference MEG and review letter 0.50 to Kliebert and notice of entry.
[emphasis added]

On 7/8/97 Gerber was attending to Respondents' reply brief to Appellant's opposition papers. On 7/9/97 Gerber met with Parker and discussed filing the reply papers. On 7/10/97 Parker answered the calendar call and filed the reply papers as well as the motion to dismiss. After Parker returned from the calendar call, Gerber met with her and discussed the proceedings at the call where she filed Respondents reply and dismissal papers. After his discussion with Parker, Gerber drafted letters (plural) to his clients (Respondents) advising them of the result of the calendar call. On 7/21/97 Gerber learned of the erroneous default decisions. On 7/22/97 Gerber discussed the erroneous default decisions with Miller. After the meeting Gerber commenced drafting the notice of settlement.

Appellant responded to notice of the alleged default by filing papers to vacate the default. Rather than advise Appellant

or the IAS court of their knowledge that no default had occurred on the *res judicata* motion, Respondents chose to withhold this information from Appellant and the IAS court and proceed with opposition papers -- papers in which they hid from Appellant and the IAS court their knowledge that the papers had been filed. Rather than tell the truth and allow the IAS court to proceed on papers already filed with the IAS court on 7/10/97 (Respondents' motion for dismissal and Respondents' reply to Appellant's opposition to said motion) and copies of papers already filed with the IAS court on 7/10/97 but lost by the Clerk of the Court (Appellant's opposition papers), Respondents chose to permit and encourage unwarranted and patently unnecessary judicial proceedings (motion to vacate the default and subsequent proceedings).

The trial court was wrong to permit these monies to be included in its determination. The Court must disallow all the items in Defendants' 1 (R1273-1311) related to the work performed subsequent to Respondents' failure to advise Appellant and the IAS Court of their knowledge that Appellant's opposition papers were filed with the Clerk of the Court. Said amount totals $17,566 as calculated below:

Amounts from Defendants' 1 (R.1273-1311) (Client Statement Report And Invoices)

Page In Record	**Invoice Date**	**Amount Of Total Legal Fee Applicable Proceedings Necessitated By Respondents Acts To Burden Appellant And Obstruct Justice On And After 7/10/97**
R.1291-1293	08/08/97	1,493.50 (of 6,923.50; see below for breakdown*)

R.1294-1297	09/10/97	5,502.50	(all)
R.1298-1300	10/14/97	2,132.50	(all)
R.1301-1303	11/12/97	3,356.00	(all)
R.1304-1306	12/9/97	1,697.50	(all)
R.1307 1309	01/13/98	3,084.00	(all)
R.1310-1311	03/12/98	300.00	(all)

*As to the 08/08/97 invoice (R.1291), the amounts disallowed include Miller (JMM) $337 (.9hr): 7/23 .5hr, 7/25 .4hr; Gerber (MEG): $1020 (5.1hr): 7/10 .5hr, 7/21 .1hr, 7/22 2.5hr, 7/23 .8hr, 7/25 1.2hr; Kimberly A. Axelrod (KAA) $72 (.9hr): 7/22 .6hr, 7/23 .3hr; Parker (CPJ) $64 (.8hr): 7/23 .7hr, 7/31 .1hr.

c. Fees Associated With Respondents' Motion For Extension Of Time To Respond To The Complaint As Well As Respondents' Personal Jurisdiction Motion Were Procured By Calculated Efforts To Obstruct Justice, To Evade Service On LaFergola, And To Burden Appellant

Legal fees appearing on Defendants' 1 (R.1273-1311) for Respondents' application for an extension of time to respond to the Complaint and Respondents' personal jurisdiction motion (LaFergola Motion) were unnecessary and the result of Respondents' misconduct. These two efforts we undertaken

wholly as a result of Respondents' calculated efforts to obstruct justice, evade service on LaFergola and to cause Appellant unnecessary burden.

The full appreciation of Respondents' misconduct as to the motion to extend the time to respond to the Complaint and Respondents' personal jurisdiction motion can only be had when seen in light of Gerber's claim to the trial court that

> "The evidence will show the ***complexity*** [emphasis added] of the pro se plaintiff's papers in this action, the *procedural hurdles* [emphasis added] which defendant had to face in successfully defending this action, the ***efficiency*** [emphasis added] in which defendant's counsel acted and the reasonableness of the counsel fees." (R.84[P.3L.20])

and after one understands that Respondents' attorneys Miller and Gerber appeared for Respondent LaFergola as early as *January 7, 1997*, if not earlier. This fact was established at trial in testimony and statements made on Respondents' behalf. Citing from the record at trial (R.242[P.161, L4]):

> [ROSENKRANTZ] Q.: Moving down to you next entry of 1/7/97. You have a telephone call with Mr. Lafergola concerning new action. Do you have any documentation or note indicating what you discussed with him? Telephone call with Mr. Lafergola concerning new action?
>
> [MILLER] A.: I have no note or documentation.
>
> [ROSENKRANTZ] Q.: Was it during the business day, the hours of the business day?
>
> MR. GERBER: Objection, irrelevant.
>
> THE COURT: What?

[ROSENKRANTZ] Q.: The conference with Mr. Lafergola, the telephone call, the significance of that?

THE COURT: I am going to sustain the objection.

[ROSENKRANTZ] Q.: Do you know what was said to Mr. Lafergola?

MR. GERBER: Objection. *It's a private communication between attorney and client.* [emphasis added]

THE COURT: Sustained

[ROSENKRANTZ] Q.: Do you remember what you said to Mr. Lafergola?

MR. GERBER: Objection.

MR. ROSENKRANTZ: Not what he said.

MR. GERBER: *Legal advice is protected by the privilege.* [emphasis added]

THE COURT: Was it -- to your knowledge, was the subject matter confidential?

[MILLER] THE WITNESS: Yes.

These statements by Gerber to the trial court were neither modified nor contradicted by Miller as he sat under oath and heard the statements by Gerber.

Further, that Miller and Gerber were already representing LaFergola and the other named Respondents at the time Respondents refused Appellant's request that service of the Summons and Complaint on LaFergola's behalf be accepted by his attorneys by the following excerpt from the proceedings at

trial regarding Respondent's requests for an extension of time to respond to the Complaint (R.178[P.97L.12]):

> [MILLER] THE WITNESS: The time for those who were served was coming up and we wanted to be able to make a single motion because we thought it would be more efficient both for ourselves, *and our clients* [emphasis added] and for the Court if there was one motion made. We approached Mr. Kliebert, requesting that adjournment. We did it in writing. I believe Mr. Kliebert refused to --

And R.180[P.99L.]:

> THE COURT: What did you want in these stipulations?
>
> [MILLER] THE WITNESS: We wanted to extend the time for *all defendants* [emphasis added] to answer or respond or move with respect to the complaint.

Contrary to Gerber's claims above about what the evidence shows, the evidence at trial shows that not only did Respondents' counsel not act efficiently, but that lion's share of the proceedings were necessitated as a result of Respondents' intent to burden Appellant with unnecessary work, to evade service on LaFergola, and to obstruct justice; that the only "procedural hurdles" Respondents had to face were those created by their own acts of misconduct and Respondent's efforts to obstruct justice. And as to the "complexity of the pro se plaintiff's papers in this action" Respondents argued to the IAS court below (which made the award of attorneys fees on the grounds of *res judicata* in 1997) that the facts and causes of action in the instant complaint were essentially identical to those in a prior proceeding (McKoan) at which the very same attorneys -- Miller & Gerber of Miller & Wrubel -- appeared and successfully defended.

Rather than refuse an extension as Respondents testified at trial, Appellant agreed (R.938) to Respondents' request (R.933) for an extension of time if Respondents would agree to authorize their attorneys to accept service of the Summons and Complaint on the named Respondents who remained to be served (Lafergola, Kidder Group, and Kidder). This request was appropriate, reasonable and sparing of expense, and as evidence at trial shows (see above statements by Miller & Gerber before the trial court), Miller & Wrubel was already appearing for LaFergola at the time they requested an extension.

Further, evidence that Miller & Wrubel were appearing for all the named defendants at the time they refused to accept service on LaFergola can be found in the record in the proceedings before trial. Respondents' attorney Gerber had already indicated in the letter requesting an extension that Miller & Wrubel was appearing for all the named Respondents (just as Miller & Wrubel has appeared for all the named Respondents except Cerullo in the prior action, McKoan). Quoting from the fifth paragraph in Gerber's letter (R.933):

> "In the event that additional named defendants are served with the Summons and Complaint, *we request that the time for such additional named defendants to respond to the Complaint* [emphasis added] be extended for sixty days from the latest date of completion of service upon all such additional named defendants, or be extended to April 18, 1997, whichever extension date is later."

Gerber here was clearly speaking for "such additional named defendants" -- Lafergola, Kidder Group and Kidder -- by requesting on their behalf "that the time for such additional named defendants to respond to the Complaint be extended for sixty days from the latest date of completion of service upon all such additional named defendants, or be extended to April 18,

1997, whichever extension date is later". Incongruously, Gerber refused to accept service for Lafergola while agreeing to accept service for Kidder Group and Kidder. In his letter (R.935-936) agreeing to accept service for Kidder Group but refusing to accept service for LaFergola, Gerber states:

> "Please be informed that this office has not been authorized to receive or accept service of the Summons and Complaint on behalf of Mr. LaFergola."

Gerber expanded upon his earlier statement that the attorneys had not been authorized to receive or accept service of the Summons and Complaint in a follow up letter (R.937-938) dated January 31, 1997:

> "As I explained in my fax to you yesterday, Mr. LaFergola has not consented to this firm receiving or accepting service of the Summons and Complaint on his behalf in the current action. . . ."

Despite Lafergola's (or Respondents', or Respondents' attorneys') refusal to permit acceptance of service upon their attorneys, Appellant was still willing to agree to Respondents' stipulation for an extension of time to respond conditioned upon Respondents' agreement that Miller & Wrubel would not represent Lafergola later in any proceeding related to this action.

Appellant proposed this stipulation based on his belief that Respondents' were acting in bad faith and attempting to evade service on LaFergola. Respondents refused and the proceedings for an extension of time to respond and the subsequent motion for dismissal due to lack of personal jurisdiction ensued.

Appellant's stipulation was reasonable and easily effected were it not for Respondent's determined resolve to

evade service on LaFergola. The grounds for the request are stated in Appellant's letter (R.939):

> . . . This [refusal to accept service on behalf of Lafergola while accepting service on behalf of Kidder Group and Kidder]is inapposite to your earlier invocation of appropriateness, reasonableness, efficiency and common professional courtesy.
>
> Your letter fails to explain why your firm is "authorized" to accept service for Kidder Group and Kidder (and to presumably appear for them) and not authorized to receive or accept service on behalf of Lafergola. My concerns over the issue of good faith is based on the fact that you and your firm represented all the named defendants (except for Cerullo) in Kliebert v. McKoan, et al.; that General Electric has responsibility for Lafergola's legal expenses in this case; and that the defendants have a history of making bad faith requests for extensions of time and of creating unnecessary delay and expense (see Kliebert v. McKoan et al).
>
> I suggest that you clarify the issue of authorization as to Lafergola with Lafergola and the defendants and set it forth in writing to me. Should you be unable to obtain authorization, for whatever reason, I will agree to the stipulation as faxed to me today, given the addition to the stipulation that you, your firm, or any person in the employ of your firm be barred from representing Lafergola in this suit or in state or federal appeals resulting from decisions in this suit.
>
> *I believe it is appropriate, reasonable and efficient for your firm to agree to receive and accept service for Lafergola. I believe it is within your firms*

power to obtain any authorization that might be necessary. [emphasis added]

Please advise.

Further, evidence at trial in the form of testimony by Miller shows that the decision to refuse service was not made by LaFergola but was made either by Respondents' attorneys or Respondents. Citing from the record (R.285[P.204L.4])

[ROSENKRANTZ] Q. Do you know whether Mr. Gerber had any discussion with Mr. LaFergola about accepting service of the summons on his behalf?

[MILLER] A. Yes, he did not.

[ROSENKRANTZ] Q. He did not?

[MILLER] A. To my knowledge, I had those discussions.

[ROSENKRANTZ] Q And you had those discussions?

[MILLER] A. That's correct.

[ROSENKRANTZ] Q. Did you request of Mr. LaFergola his permission to accept service of summons on his behalf?

[MILLER] A. I feel a little constrained about my ability to respond to that, your honor.

MR. GERBER: I would object on privileged ground. [emphasis added]

THE COURT: Sustained.

[ROSENKRANTZ] Q. Mr. Kliebert points out that the letter that your sent him fails to explain why your firm is authorized to accept service for the Kidder Peabody Group and not authorized to receive or accept service on behalf of Mr. LaFergola. Did you ever answer Mr. Kliebert about that?

[MILLER] A. I don't know that we did or not. I didn't see that I was required to tell him that we did agree to accept service on behalf of certain of certain of our clients in order to --

THE COURT: Not on behalf of -- all.

THE WITNESS: That's right. There were reasons for that, your Honor.

[ROSENKRANTZ] Q. Well, did General Electric or Kidder Peabody have responsibility for -- strike that.

Did Kidder Peabody agree to pay for Mr. LaFergola's legal expenses?

[MILLER] A. It did pay for Mr. LaFergola's expenses as well as for the other defendants.

[ROSENKRANTZ] Q. And so therefore, did you tell Mr. LaFergola or suggest to Mr. LaFergola that you would or could accept service on his behalf?

MR. GERBER: Objection. It's privileged. [emphasis added]

MR. ROSENKRANTZ: That is his statement. That isn't privileged.

MR. GERBER: Legal advice to a client. [emphasis added]

MR. ROSENKRANTZ: It isn't. It's a statement. It's a question.

THE COURT: I'm not sure that that really is -- well, accept service for you?

MR. GERBER: I don't believe a layperson knows anything about accepting service. [emphasis added]

THE COURT: It's borderline if it is.

MR.GERBER: It's legal advice.

MR. ROSENKRANTZ: No, it isn't. Mr. LaFergola knows that his legal fees are being paid for.

THE COURT: By Kidder Peabody?

MR. ROSENKRANTZ: Exactly.

THE COURT: Fine.

[ROSENKRANTZ] Q. You state that that it was understood between you and Mr. LaFergola --

THE COURT: That he would accept service?

MR. ROSENKRANTZ: No. That his legal fees were going to be paid for -- fine. And that question is did you suggest to him did you advise him that Kidder Peabody could accept legal services oh his behalf?

THE COURT: The more you say, the more I will sustain the objection.

[ROSENKRANTZ] Q. Let me modify it then. Did you have any discussion with him about that?

THE COURT: About whether or not Kidder would accept service?

MR. ROSENKRANTZ: Yes.

[MILLER] A. No.

The Court is also asked to take special note of Gerber's statement to the trial court as to LaFergola's ability to make the simplest of decisions: to consent to have his attorneys' accept service on his behalf: "I don't believe a layperson knows anything about accepting service." But certainly attorneys Miller and Gerber did. And certainly the attorneys at Kidder and General Electric did.

The reasons for Respondents' refusal to permit the most reasonable of reasonable requests -- that of Appellant's request of service upon LaFergola attorneys[17] -- the reasonableness of which is underscored by the fact that Respondents attorneys would accept service upon Kidder Group and Kidder -- are Respondents' efforts to evade service on LaFergola and Respondents' desire to unnecessarily burden Appellant. An explanation for Respondents' reasons for evading service on LaFergola can be found in the Complaint. On April 28, 1995 at a meeting between LaFergola, other Kidder employees, and Appellant, LaFergola had indicated his willingness to tell the truth about the false statements he was made to make in the underlying misdemeanor proceeding. As stated in the Complaint (R.632, par. 22 (c)), LaFergola admitted at this meeting that:

> "the statements attributed to him [LaFergola] in the misdemeanor complaint are false, that they were composed by the corporate Defendants, that prior to

---

[17]And as evidence at trial established, Miller and Gerber were appearing for LaFergola as early as January 7, 1997, if not earlier.

making the statements contained in the misdemeanor complaint his superior, defendant Edward A. Cerullo sat him down, spoke these words to him, that LaFergola denied repeatedly that these words were said by Appellant or that anything threatening was said by Appellant in their conversation, and that Cerullo ordered him to make these statements to the Office of the District Attorney of New York County. Further, LaFergola has stated to witnesses that Cerullo told him not to be concerned about making false statements owing to Defendants' influence in the District Attorney's Office."

The refusal to accept service upon Respondents' attorneys regardless of whether the decision was made by Respondents' or LaFergola was at its worst a purposeful and conscious attempt to avoid service on LaFergola, or, at its best, an effort to unnecessarily burden Appellant by denying Appellant and an efficient and reasonable request.

It was improper for the trial court to allow these claims in its judgment. For all the reasons above, the Court must disallow all the items in Defendants' 1 (R.1273-1311) related to the extension for time to respond and the personal jurisdiction motion. These amounts total $17,640, with $6,098 for the motion for extension to respond and $11,542 for the personal jurisdiction motion as calculated below:

Amounts from Defendants' 1 (R.1273-1311) (Client Statement Report And Invoices)

Page In Record	Invoice Date	Amount of Total Legal Fees Applicable Proceedings Necessitated By Respondents' Acts To Burden Appellant, Evade Service On LaFergola And Otherwise Obstruct

		Justice As Related To The Personal Jurisdiction And Extension Of Time Motions
R.1274-1276	2/18/97	$3210 of the total of $3860 billed for fees. Applicable to extension of time to respond motion. Items claimed represent recognition and acknowledgment by Miller & Wrubel that they were appearing on behalf of LaFergola as well as all the other named Respondents as early as Miller's first billable service in connection with this action on 12/30/96: Miller (JMM) entries for 12/30/96, 1/2/97, 1/7/97, & 1/15/97; all fee entries commencing with the Gerber (MEG) entry on 1/24/97.
R.1277-1279	3/12/97	$3190 of the total of $3190 (all) billed for fees.$2888 forextension of time to respond/$302 for personal jurisdiction motion (all is applicable to the motion to entend other than Miller (JMM) entry of 2/25/97 .6hr and the Gerber (GEM) entries on 2/24/97 .30 hr and 2/25/97 entry .2hr.
R.1280-1283	4/9/97	$11,240 of the total $13,040 billed for fees. Work associated with the personal jurisdiction motion other than 9 hours ($1800) by Gerber and clearly marked as dedicated to the res judicata motion (3/10/97 &

3/11/97 entries by Gerber ("MEG").

d. Respondents' Related Misrepresentations Before The Court Of Appeals

Respondents by their attorneys Miller & Wrubel were dishonest before the Court of Appeals in their Memorandum of Law In Opposition to Motion Seeking Permission To Appeal, Or, Alternatively, An Appeal As of Right bearing the signature of attorney Michael E. Gerber and offered to the Court of Appeals in opposition to Appellant's motion for, among other things, permission to appeal the prior appeal in the instant case. According to attorney Gerber, Appellant's appeal "presents for review no novel legal questions" (Gerber at page 2 of the memorandum). Attorney Gerber's statement is impeached by his own sworn testimony before the trial court in proceedings related to this appeal. In the proceedings before the trial court, Gerber states under oath in an attempt to justify an amended demand for $76,863.31 in attorney's fees that:

> ". . . many of these claims [Appellant's 19 causes of action in General Electric] were, in my opinion, novel . . . ".

Attorney Gerber here labels Appellant's claims as "novel" in contrast to his claims before the Court of Appeals.

Similarly, Respondents' asserted in the proceedings before the IAS court that the Complaint was frivolous. But before the trial court, Respondents' reversed this argument. Before the trial court Respondents' claimed that the work the trial court ruled to be unreasonable was crucial because of the novel questions and the substantial questions of law presented by Appellant's Complaint. By Respondents' own claims, there was no basis for the award of attorneys fees since, rather than

being frivolous, the Complaint raised novel questions and substantial questions of law that said substantial and novel questions were of such magnitude that attorneys Miller and Gerber required weeks of dedicated legal expertise and research (purportedly valued at an amended $76,863.31) in order to defeat Appellant's claims. Any fee award is inappropriate and unlawful given Respondents' attorneys' own arguments for the merit of Appellant's Complaint. Respondents' attorneys' bad faith arguments here and before the Court of Appeals is additional basis for reversal of the attorneys' fee award.

4. The Decisions By The Trial Court Were Improper, Arbitrary And Capricious, An Abuse Of Discretion And Contrary To The Weight Of The Evidence.

a. The Size Of The Reduction Of The Award Of Attorney's Fees For Instances Of Abuse Found By The Trial Court Was Grossly Inconsistent With The Evidence

1. The Dollar Value Of Unnecessary Work And Double-Billing As Determined By The Trial Court Is In Gross Conflict With The Evidence.

The trial court found that Respondents' claims for legal fees contained claims for unnecessary work and instances where Respondents engaged in the practice of "double-billing". At the close of proceedings the trial court made a quick mental estimate of the time involved in instances of unnecessary work and reduced the award by 15,863[18]. The trial court did not

[18]This represents the amended claim of $76,863.31 less the $1,000 disallowed for disbursements and the $60,000 awarded.

support its quick mental estimate with any written calculations. Said casual estimate grossly understated the dollar value of the unnecessary work and double billing. Citing from the transcript as to unnecessary work (R. 401-402[P.320L.20-P.321L.22; R.404[P.323L.2], respectively):

> THE COURT: . . . Mr. Rosenkrantz' statement about doing unnecessary work this Court believes is correct.
>
> We had motioned a motion dismissed for lack of personal jurisdiction, we had other motions and memoranda and Mr. Gerber was honest enough to say that not every memoranda was asked for by Judge Wilk, but the firm just figured that they should do it. 20 hours here, et cetera, et cetera.
>
> There Mr. Rosenkrantz is correct in the opinion of this Court . . . but I'm not sure why a firm is going to do a memorandum when the judge before whom the motion is supposed to be heard doesn't ask for it.
>
> Sometimes when a motion is before this Court, I will ask I be given a memorandum within two weeks.
>
> If I don't ask for it, I would seriously question whether one would be presented and why there would be billing for the amount of work that was done.

And later (R.404[P.323L.2):

> THE COURT: . . . unnecessary work probably in the neighborhood of, I don't know, maybe 30, or 40 hours at the most. . . .

This quick and casual mental estimate rendered from the bench without support of any written calculations is grossly inconsistent with the evidence. The trial court reduced the legal

fees amount of the award by 15,863[19]. The reduction of $15,863 contrary to the weight of the evidence. Such a reduction would cover the $11,542 in fees claims on the personal jurisdiction motion but not even dent the $35,082 in fees claimed in preparation of the *res judicata* motion or the $9,578 for work associated with reviewing and responding to Appellant's opposition papers the knowledge of which Respondents hid from the IAS court resulting in *another* $17,566 in fees made necessary only as a result of Respondents' efforts to obstruct justice (*See* Argument Point I (B) (3) (b)).

Further, this allowance of $15,863 makes no provision for the trial courts finding that Respondents had engaged in the practice of "double billing". Citing from the transcript as to the unnecessary work by Respondents and specifically the findings that Respondents had engaged in the practice of "double billing" (R.401[P.320L.5-7] and R.398-399[P.317L.23-P.318L.20], respectively):

> THE COURT: . . . And there is a question in the Court's opinion about the "Double billing.". . . .
>
> THE COURT: . . . mentioned by this Court and I'll mention it again -- this mentioned to Mr. Miller yesterday and Mr. Rosenkrantz followed up a little bit that there is a concept in legal fees cases of something known as double billing.
>
> And for the record, that means that if Mr. Miller and Mr. Gerber spoke -- or Mr. Miller spoke with any of the other lawyers in his firm, that for the time he and another lawyer are speaking, that legal fees are doubled

[19]This represents the $76,863.31 claimed by Respondents at trial less the $1,000 disallowed for disbursements and the $60,000 awarded.

> because each lawyer would be billed for his or her amount.
>
> So that in effect, instead of getting a bill for $200 or $300, you might get a bill for four or $600. Nobody really went into that sufficiently. Mr. Miller did testify that it might have happened with some people. He wasn't sure.

Miller's time alone for double billing was estimated at trial as about 19 hours (R.399[P.318L.23]); that alone represents over $7,000[20] in wrongful fees which is not reflected in the trial court's figure.

The trial court found the time Respondents' claims for producing memorandums of law that were never required by the IAS court as gratuitous and unnecessary. The gratuitous and superfluous nature of the memorandums was underscored by the fact that the IAS did not even consider these unrequested memoranda in its 10/22/97 order as evidenced by the order itself (See R.1258-1260): the IAS court struck through the portion of the 10/22/97 prepared by Respondents for the IAS court's signature that indicated that the IAS court had considered the memoranda in its decision. The Court is reminded that the IAS granted the motions to dismiss on alleged default.

The degree to which the trial court was disgusted by the unnecessary fees claimed by Respondents' claims that the memoranda were indeed necessary can only be had by reading the portions of the transcript referring to these memoranda. Citing from the transcript R.185-186[P.104L.17-P.105L.9]:

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[20] 19 hours at $375 hr.

THE COURT: Why do you have to put in a memorandum of law on failure to dismiss -- for failure to serve?

MR. ROSENKRANTZ: I have no objection to this.

MR. GERBER: You are required in making a motion.

THE COURT: Sir, not in the State Courts, absolutely not. You are not required to do that.

[MILLER] THE WITNESS: The rules say so.

THE COURT: You are incorrect, sir. Judges, they do their own thing. Some judges may like it, some judges don't care. All right. Go ahead. As long as there is no objection, it's Number 6.

Later at R307-308[P.226L.9-P.227L.13]:

THE COURT: Mr. Gerber, let me ask you something that maybe will cut through some of this. I'm sure you remember yesterday at the end of the day Mr. Miller probably may have one or two questions before we adjourned. Mr. Rosenkrantz mentioned something, I'm not even sure it was all on the record, part of it may have been, there was testimony that he in fact -- that you spent some 65 or more hours with regard to the motion to vacate or with regard to the motion for dismissal and that you spent in total, including a memorandum of law, maybe 90 to 100 hours - all with regard to the Kliebert number two case. Now, you -- I'm sorry, Mr. Miller, Mr. Rosenkrantz both said that you were a very good lawyer. The point remains, however, why would it take you, as a good lawyer, 90 to 100 hours to make a motion with a memorandum of law on a case like this which was with one pro se

plaintiff, if you will. Mr. Rosenkrantz is talking about whether or not something like this should take you in the 90 to 100 hour area. What is your response to that?

Later at R.311-12[P.230L.8-P.231L.3]:

THE COURT: I'm aware of that, but I think the point that Mr. Rosenkrantz was making and agreeing with Mr. Miller, your supervisor, that you're a very good lawyer, the question was whether or not being a good lawyer, whether or not the number of hours you spent on that motion was really required. Mr. Rosenkrantz was jumping out of his skin to say it shouldn't have been because Mr. Gerber is a very good lawyer. Mr. Miller didn't really comment. He said if you said it took eight or nine hours, it took eight or nine hours, and he really didn't question that. It is up to me to question that because part of what you're claiming here deals with hours Michael Gerber spent on this case.

Later at R.312-313[P.231L.24-P.232L.22]

THE COURT: Now, there was also, if I remember right, maybe I do and maybe I don't. If I don't, I'm sure you'll correct me, there was a motion I think to dismiss based on improper service.

[GERBER] THE WITNESS: Personal jurisdiction.

THE COURT: There was also testimony that aside from that motion which you spent a lot of time on, you spent sometime on a memoranda specifically with regard to the motion dealing with improper service, failure to serve properly. Now, I don't know, Mr. Gerber, but if somebody, if a lawyer or lawyers on certain things may ask for memoranda, but I wonder a little bit in a matter like this when you present a memo to a judge with

regard to this dismissal for failure to have personal service or whatever, is it really necessary?

Later at R.314[P.233L.14-L.24]:

THE COURT: I understand that, but there is almost something else here. If somebody comes into this Court and I have a traverse, I like to think I know something about what the law of traverse is myself. And I wonder almost if it was really necessary to go to Judge Wilk who also knows I think the law of traverse, for you to present to him a memo, a memorandum which may have taken you 25 or more hours --

Later at R.315[P.234L.10-L.13]:

THE COURT: I'm saying it's so easy. 30 hours of time spent on the memorandum dealing with dismissing for failure to properly serve --

Later at R.317[P.236L.2-L.22]:

THE COURT: That is fine, except for one thing. You want to help this Court or any other Court, I'm sure the Court would be very to get the help. The problem, Mr. Gerber, is only that the judge sees a memorandum that you spent 30 additional hours on is something else. And I just wonder about the necessity of spending the extra number of additional hours on a memorandum which I don't believe Judge Wilk had ever requested. If I'm wrong, please tell me.

[GERBER] THE WITNESS: You're not wrong. Judge Wilk did not make a request.

THE COURT: Exactly. And yet we hear about a memorandum that you spent 25 or more hours on, at

least that is what Mr. Miller indicated time-wise. If I'm wrong, please correct me.

R.320[P.239L.7]:

THE COURT: Approximately ten?

R.320[P.239L.21-L.22]:

THE COURT: To dismiss for improper service?

THE WITNESS: I had a discussion with Mr. Lafergola.

Later at R.328-329[P.247L.16-P.248L.2]:

THE COURT: It just seems to me that you're asking the similar, the same or similar questions again and again and Mr. Gerber has stated that he can't break down whether it's 3 hours, 2 hours or whenever, he can't necessarily break down how much with regard to each motion or each memoranda. He can't say I spent 3 hours on the Kliebert case, on such and such a day, but not necessarily with regard to motion A, motion B and motion C.

The evidence above shows that the trial court viewed all the work on the *res judicata* and personal jurisdiction motions to be unreasonable and unnecessary. And, as stated earlier the IAS struck the reference of memoranda as having been read on the motions from the 10/22/97. As the evidence above shows, that by the trial court's own reckoning 65 unnecessary hours were spent on responses to the motions to vacate (order to show cause), 90-100 on the *res judicata* motion, 25-30 on the personal jurisdiction motion. Here we have 180-195 unnecessary hours which -- if calculated by Gerber rate of $200 an hour -- represents $36,000 - $39,000.

Add to this the "double billing" if only including the $7,000 for time for Miller, brings the total of the reduction to $43,000 to $46,000. Further, these numbers do not even approximate the full amounts represented by fees claimed as a *result of Respondents' knowingly and willful misconduct (See* Argument Point I (B) (3) (a) (b) & (c).

2. It Was Improper For The Trial Court To Admit Into Evidence Defendants' 1 And The Testimony Of Miller As The Credibility Of Each Was Impeached By Evidence At Trial And Owing to The Existence Of Best Evidence and Respondent's Willful Disregard For The Subpoena

Respondents submitted as prima facie evidence of the attorneys' fees paid by Respondents Defendants' 1 (R.1273-1311[Client Statement Report and supporting invoices and "record"(s)]) and the testimony (R.90-288[P.9-P.207]) of Joel M. Miller, senior partner at Miller & Wrubel. Appellant's counsel objected to the introduction of Defendants' 1 into evidence and challenged the truthfulness of Miller's testimony. Appellant's counsel later called Gerber to the stand to impeach testimony by Miller and Defendant's 1. Miller's testimony, and later Gerber's testimony, impeached Respondent's claims for the authenticity and truthfulness of the documents in Defendants' 1 was further impeached by inconsistencies between the documents themselves. In turn, the documents in Defendant's 1 impeached the creditworthiness of the testimony by Miller as well as by Gerber.

To fully appreciate the corrupt nature of Defendant's 1 (R.1273-1311) the Court is directed to the following excerpts

from the transcript containing testimony by Miller. Citing from the transcript at R.94-95[P.13L.22-P14L.3]:

> [GERBER] Q. What does the client statement report show [R.1273]?
>
> [MILLER] A. It's a summary of their invoices sent on a particular matter showing the dates, the fees, the disbursements, the amounts paid, the amounts unpaid and totals.

And continuing at R.96[P.15L.10-L.22]:

> [GERBER] Q. Is there a procedure by which Miller & Wrubel prepares client statement reports such as page 1.1 [R.1273]?
>
> [MILLER] A. Yes.
>
> [GERBER] Q. What is that procedure?
>
> [MILLER] A. The statements themselves, that is the amount of the statements are included in our computer system as bills are sent. When payments are received, that is also indicated by being posted in the computer system. Client statement reports are generated by the computer system to show a summary of what has been billed and what has been paid. [emphasis added]

Continuing at R.97[P.16L.3-L.5]:

> [GERBER] Q. Are client statement reports such as this prepared under your direction and supervision?
>
> [MILLER] A.Yes, they are.

Continuing at R.97-99[P.16L.13-P.18L.6]:

[GERBER] Q. Mr. Miller, I direct your attention to page 1.2 [R.1284] of Defendant's Exhibit 1 for identification. Can you identify that document?

[MILLER] A.Yes.

[GERBER] Q.Can you tell the Court what it is, please?

[MILLER] A. It's a copy of an invoice in the matter that your referred to.

[GERBER] Q. What does the invoice show?

[MILLER] A.Shows the date of the invoice, the client's name, the name of the matter, period of time for which the invoice applies, the number of attorneys or paralegals who worked on the matter during that period of time, the number of hours that each billed during that period of time, the hourly rates for each attorney or paralegal, the total number of hours and the fee which is just a multiplication of the number of the hours by the respective hourly rates, disbursements which were out of pocket expenses that were incurred and totals.

[GERBER] Q. And was this document, page 1.2, prepared in connection with the Kliebert action?

[MILLER] A. Yes, it was.

[GERBER] Q.Are invoices such as 1.2 prepared in the regular course of Miller & Wrubel's business?

[MILLER] A. Yes.

[GERBER] Q. Did you determine -- how did you determine the amount of the fee indicated on the invoice?

[MILLER] A. It's determined by the computer compiling the number of hours billed by each *timekeeper* [emphasis added] , which is shown on the following pages, times the hourly rate that is shown *after I review the hours that were billed to determine that they are appropriate* [21]. [emphasis added]

[GERBER] Q. Are invoices such as 1.2 sent to the client? [emphasis added][22]

[MILLER] A. Yes.

[GERBER] Q. And are invoices such as 1.2 prepared under your direction and supervision?

[MILLER] A. They are.

Continuing at R.99-100[P.18L.12-P.19L.9]:

[GERBER] Q.Are invoices such as 1.2 retained in the regular course of your firm's business?

[MILLER] A. Yes.

[GERBER] Q. I direct your attention to page 1.3 and 1.4 of Defendant's Exhibit 1 for identification. Can you identify that document?

[MILLER] A. I can.

---

[21]The Court is asked to take note that Miller alleges to check the hours billed by each employee before they are sent for compiling. And that Miller alleges to review all these hours for "appropriate[ness]".

[22]As argued later, there is no evidence that the documents -- or copies of the documents -- contained in Defendants' 1 were ever mailed or otherwise delivered to Respondents.

[GERBER] Q. What is it, sir?

[MILLER] A. That is a computer generated [[23]] document that shows the date that services were performed by each attorney or paralegal, the initial of that attorney or paralegal, a description of the services that were performed by that individual during the month and the number of hours in tenths of an hour that were spent by each individual performing the services during that period of time. It also has a total hours spent by all the attorneys and paralegals during the period of time, dollar total value of those hours based upon the billing rate and history of disbursements, and then a total of the fees and disbursements.

P.19L.25-P.22L.21:

[GERBER] Q. What is the procedure by which this document was prepared?

[MILLER] A. *Each attorney or paralegal is required to record time and services every day* [[24]]. *Then each attorney and paralegal is required to provide that record of time and services to our office administrator* [[25]] *who records it into our computer system. And at the beginning of each month the administrator provides*

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[23]This Client Statement Report is dated 4/24/98.

[24]As argued herein, Miller's statement here is contradicted by his later testimony and is contradicted by the testimony of Gerber.

[25]As argued herein, evidence at trial shows that the data is entered directly by the attorneys or their secretaries. There is no indication of an "adminstrator['s]"involvement anywhere in subsequent testimony by Miller or Gerber.

a record such as 1.3 and 1.4 to the billing department in order to prepare a bill [26]. [emphasis added]

[GERBER] Q. Mr. Miller, did you determine if the services indicated on time records 1.3 and 1.4 were necessary?

MR. ROSENKRANTZ: Objection. Calls for a conclusion.

THE COURT: Mr. Gerber, it does call for a conclusion.

MR. ROSENKRANTZ: May I just say one thing, your Honor. I subpoenaed a number of documents, It would be nice to see some time sheets if they exist.

MR. GERBER: *I will represent that these are the time sheets. These are the time records of this firm for this matter as well as the invoices and the client statement reports.*[27]

THE COURT: If these are the time sheets, then that answers your question. Go ahead.

[GERBER] Q. Are time records --were these time records 1.3 [R.1275] and 1.4 [R.1276] sent to the client in this case?

---

[26] As argued herein, the invoices and "record[s]" all bear mid month dates; further many of the "record[s]" are dated as having been provided after the invoices were generated. Example, the 4/9/97 invoice (R. 1280) was prepared with "record[s]" dated 4/11/97 (R.1281-1283).

[27] As later testimony by Gerber established, these were not the time sheets prepared and submitted to the firm. Gerber himself testified that other time sheets existed but that he had not brought them to trial.

[MILLER] A. Yes, they were.

MR. ROSENKRANTZ: Objection. Calls for a conclusion.

THE COURT: How do we know -- did he send them? Objection sustained. Unless this man mailed it.

[GERBER] Q. Do you know whether or not this time record was sent to the client?

[MILLER] A. It's my belief it was.

THE COURT: I don't want his belief. Sustained. Mr. Miller, did you mail them?

THE WITNESS: I did not, your Honor.

THE COURT: Then what is the basis of your belief?

THE WITNESS: Our procedure, your Honor.

THE COURT: It doesn't matter. Objection sustained.

[MILLER] A. I guess I can answer that, your Honor that --

MR. ROSENKRANTZ: Objection to guessing.

THE COURT: I will sustain it. You're the senior man in this firm, whatever, and you can't tell me for sure what happened. The objection will be sustained. Not I believe, I think or whatever. That is all you can tell me, then I'm sustaining Mr. Rosenkrantz's objection. We don't want beliefs and thoughts and possibilities and maybe's.

Continuing at R.106-107[P.25L.24-P.26L.2]:

[GERBER] Q. And were these documents prepared in accordance with Miller & Wrubel's regular procedure?

[MILLER] A.Yes.

Continuing at R.109[P.28L.20-L.21]:

[MILLER] A. I don't understand the question. I saw lots of documents.

Continuing at R.119-121[P.38L.12-P.40L.16]:

THE COURT: Maybe its too much, maybe its too little [referring to the time billed], but you really don't know from looking at this, because it has .40. He may be going very slowly, There is no way of really telling from really looking at this document. That is all

[MILLER] THE WITNESS: *We have a procedure*[28], these are business records, your Honor, that are done according to *procedure which requires timekeepers including GV in this case, to record as he does work what he's doing and the amount of time he spends doing it*[29]. *And I know people do that because we keep spot checks*[30] *on that. We see how many hours are billed in a day. We see how many hours are billed in a month. We see what people do.*

---

[28]Miller failed to provide copies of any procedures manuals, protocals, etc. in response to the subpeona.

[29]Later testimony by Miller and Gerber establishes that "timekeepers" (employees) are not required (and don't) "record as he does work what he's doing and the amount of time he spends doing it".

[30]No records of these "spot checks" was provided at trial.

THE COURT: There is a serious problem here. I wouldn't care what this said except for the fact that you have asked Mr. Gerber to proceed on a claim for legal services. Now, part of the claim for legal services is the number of ours spent on doing different things for this case. There is no possible way that this Court can have -- can know that these different figures all the way from 1.3 to 1.39 [R.1285-1311] are legitimate figures. These are figures -- look let's go to 1.36 [R.1308]. 12-12-97, prepare and revise judgments and affidavits in support of same as per judgment. I don't know if eight-tenths of an hour is legitimate or not. MEG took eight-tenths of an hour, but how do we know from looking at this whether or not eight-tenths of an hour is a legitimate time. Is too slow or what?

[MILLER] THE WITNESS: I don't think I have been asked that question, but I think I will try to explain that to you, your Honor.

THE COURT: I think what you're doing is asking this court to award legal fees and presenting a document like this -- it's a question that has to be answered. How do we know the basis of any of your time claims?

MR. GERBER: I'm only trying to get this admitted for identification purposes. Having Mr. Miller identify the document, I was then going to ask Mr. Miller if he, on the basis of his experience with the firm as an attorney, whether he was familiar with the amounts charged by similar attorneys for similar services, the amount of time spent for such services and whether in his opinion those services and charges were reasonable.

THE COURT: Ask him. You're the one who wanted to do this on this case.

MR. GERBER: Your Honor, I've been -- I was going to ask that once the document was in evidence.

THE COURT: He's got the document. Go ahead.

MR. GERBER: I was asking that it be admitted in evidence before I ask him substantive questions about whether or not the amounts are reasonable.

Continuing at R.130[P.49L.19-L.24]:

MR. GERBER: He [Miller] was intimately familiar with everything that goes on in this case. He's the attorney, as he testified, in charge of this matter and supervised all of the employees who worked on the matter. [31]

Continuing at R.132[P.51L.8-L.14]:

THE COURT: So your statement now in open court is that all of the bills and disbursements in Defendant's 1 for identification were paid to you by Kidder Peabody and General Electric?

[MILLER] THE WITNESS: And/or General Electric, yes.

As seen from the excerpts above Miller claimed that all the amounts alleged on the Client Statement Report and the invoices had been paid by either Kidder Peabody or General Electric. Fees claimed on the individual invoices were "determined by the computer compiling the number of hours billed by each timekeeper, which is shown on the following pages, times the hourly rate that is shown "after I [Miller] review the hours that were billed to determine that they are appropriate". According to Miller's testimony here, he (Miller) reviews all the hours that are billed to determine whether they

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[31] As evidence at trial later demonstartes, this was not the case.

are appropriate before the computer compiles the amounts for the invoices.

Appellant's counsel challenged the truthfulness of Miller's & Gerber's statements (and later Gerber's testimony) that all the invoices were paid asserting that the subpoena required Respondents to produce all documents relating to fees and expenses incurred and paid by Respondents in the instant case. This required evidence of all of Respondents' original bills and any modifications as well as all bills, time records as well as all documents, manuals, and protocols on the procedures required in producing these documents in the possession of Miller & Wrubel[32]. Respondents willfully disobeyed the subpoena and did not produce the requested documents.

The Court is asked to note that the invoices (monthly bills) were never alleged by Miller and Gerber to be the original invoices sent to Respondents. There is no evidence at trial that these invoices were sent to the Respondents. There is no evidence at trial that these were the only invoices send to Respondents. There is no evidence that they were paid as alleged. Further, and importantly, neither Miller nor Gerber ever allege that the invoices annexed to Statement were paid *in full*.

Appellant's counsel challenged the admissibility of the Defendants' 1 and challenged the admissibility of Miller's testimony as hearsay and Respondents presentation of Miller as the business record exception to hearsay. The trial court initially agreed with Appellant's counsel but reversed itself later. Citing

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[32]Appellant states this on information from Mr. Rosenkrantz. Mr. Rosenkrantz could not locate the subpoena or any correspondence relative to the subpoena. Appellant asked Respondents for a copy of the subpoena and correspondence relative to the subpoena but Respondents refused Appellant's request.

from the record referring to the admissibility of Miller's testimony (R.123[P42L.10]:

> THE COURT: Why isn't it speculation and guesswork?
>
> MR. GERBER: Because Mr. Miller is the attorney who supervised this case and supervised all of the Miller & Wrubel employees who worked on this case because he reviewed these time records and was at one time, though not all at one time, provided with all of the documents that are referred to in the different entries made and was advised as to the status of the case. and was familiar with what was happening here.
>
> THE COURT: Problem with that is any advice he got is hearsay. If you told him, by the way, Mr. Miller, today thus and that happened on the case, it's your statement to him. That is an out of court statement being offered for the truth. More hearsay this Court doesn't know what would be. I mean, you tell this gentleman I did thus and so or X, Y, Z happened and why isn't that hearsay?
>
> MR. GERBER: Because Mr. Miller viewed the documents themselves. He had personal knowledge of what was going on in this case and in connection with every document and because this is offered as a business record.
>
> THE COURT: Except for the fact that -- it may have been a business record and may not, but that doesn't mean he looked over every single -- you have?

A.[33] Number of items on each page. Well, at this point it strikes me that there is a lot of hearsay involved.

Miller's testimony established that the documents in Defendants' 1 (R.1273-1311) was neither authentic nor true. Miller testified that "at the beginning of each month the administrator provides a record such as 1.3 [R.1275] and 1.4 [R.1276] to the billing department in order to prepare a bill [invoice]." Clearly, the "record[s]" in Defendants' 1 are not the records alleged to have been sent to the billing department at the beginning of each month. All of the "record[s]" in Defendants' 1 are dated mid month. The chart below is based on Defendants' 1 and lists the date of the invoice and the date on the "record[s]" annexed to each invoice. Miller testified that the invoices are compiled on the basis on the "record[s]" which are sent by the "administrator" "at the beginning of each month" "to the billing department in order to prepare a bill [invoice]". Besides establishing that these are the "record[s]" upon which the invoices were prepared, the chart shows that several of the invoices were prepared *before* the billing department received the "record[s]". Examples, the billing department received the "record[s]" upon which the 4/9/97 invoice was compiled 2 days after (on 4/11/97) the invoice was compiled; the billing department received the "record[s]" upon which the 10/14/97 invoice was compiled 1 day after (on 10/15/97) the invoice was compiled; the billing department received the "record[s]" upon which the 12/9/97 invoice was compiled 1 day after (on 12/10/97) the invoice was compiled; the billing department received the "record[s]" upon which the 3/12/97 invoice was compiled 1 day after (on 3/13/97) the invoice was compiled.

Compiled From Defendant's 1:	**Invoice**
Record	**Date**
Date	2/18

[33]From the context, it appears that these words were spoken by the trial court.

2/18	3/12
3/12	*4/9*
4/11	5/13
5/13	7/15
7/15	8/8
8/8	9/10
9/10	*10/14*
10/15	11/12
11/12	*12/9*
12/10	1/13
1/13	*3/12*
3/13	

Further testimony at trial established that no independent record of payment (i.e.., canceled checks) existed that established Respondents had indeed paid the amounts which Miller and Gerber testified were paid. Respondents claimed to show the trial court checks that alleged to show that Miller & Wrubel had been paid the amounts on the Client Statement Report. What it did show was that Miller & Wrubel had received checks from Respondents which were not in the amounts alleged in Defendants' 1 and that Miller had received payments from Respondents for work other than work performed on the instant case.

Miller's and Gerber's continued efforts to explain away the incongruity between the amounts on the checks and the amounts on the invoices only further eroded the truthfulness of their claims. Miller and Gerber claimed that Respondents combined payments for various matters on the same check, that is, they combined moneys owed Miller & Wrubel for various matters and including matters not related to the instant case. That Respondents combined different matters and cases on the same check is discredited by the evidence that Respondents issued 2 separate checks on the same date for 2 different invoices -- rather than combine matters and cases as Miller and Gerber claim -- as shown by the chart below:

Payment Date	Invoice Date	Invoice Amount	Face Amount On Check
8/97	5/13/97	27451.87	$72,840.19
8/97	7/15/97	4771.64	same
11/97	9/10/97	5884.48	same
11/97	10/14/	2266.78	same
12/97	8/8/97	7067.99	same
12/97	11/12/97	3723.49	same

Miller & Gerber alleged that the 8/97 payment of $72,840.19 check included the monies owed on the 5/13 invoice as well as other monies owed by Respondents for other matters. Respondents did not explain why -- if Respondents combined payments for different matters -- combined payment for other matters on this check but, paradoxically, cut a separate check on the same date for the 7/15 invoice which Respondents paid at the same time as the 5/13 invoice. Similarly, Miller could not explain why Respondents, who combined payments for different cases on the same check, cut separate checks on 11/97 for the 9/10 and 10/14 invoices and on 12/97 for the 8/8 and 11/12 invoices.

As to the contradictions in Miller's and Gerber's testimony, the following excerpts from the transcript are cited beginning at R.238-240[P.157L.21-P.159L.18]. The Court is respectfully directed to the footnotes for relevant comment and argument by Appellant:

> [GERBER] Q. Did you keep any simultaneous documents or notes as to how much time you spent on these attempts?
>
> [MILLER] A. No.
>
> [GERBER] Q. Was this done from memory?

[MILLER] A. No. *At the end of the day, I dictated or the next morning I dictated my time entries for the day before.*[34]

[GERBER] Q. Are there time entries that exist?

[MILLER] A. They're here.

THE COURT: In other words, your time entries are what you say is Defendant's Exhibit 1 in evidence.

THE WITNESS: Yes, they go right into the computer system. They are in Exhibit 1 in evidence.

[GERBER] Q. Mr. Miller, are your associates required to keep time sheets or time entries?

[MILLER] A. *They are required to give their secretaries or whoever is doing the typing, the time records which go into the system.* [35]

THE COURT: Now, say Mr. Jones works on Case A, spends two hours on case A form ten to twelve to the day in question, when he's finished with case A, does he make a record of some sort that I spent two hours on case A and my amount per hour is $200? How is it done?

[MILLER] THE WITNESS: *He informs one of the secretaries -- everyone has a different way of doing it -- that he spent two hours on Case A and he describes the services and the way that is described here , the*

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[34]No tapes or transcript were provided by Respondents. These statements by Miller contradict his earlier statements as to required procedure.

[35]Again, Miller here contradicts his earlier testimony about required procedure.

secretary inputs that into the computer system [[36]which eventually -- when, at the end of the month prints out page 1.3 which includes the time that that lawyer spent and the time that any other lawyer spent that was charged to this matter. The computer puts the hourly rate into it.

Continuing at R.298-299[P.217L.6-P.218L.17]

[ROSENKRANTZ] Q. Mr. Gerber, I show you what has been previously marked as Defendant's Exhibit 2. *Did you keep time sheets, sir, in December of 1996 relative to the legal work that you performed on behalf of Miller & Wrubel?*

[GERBER] A. *Yes, I did.*

[ROSENKRANTZ] Q. *And in what form were those time sheets?*

[GERBER] A. *Well, my time sheets, I guess are in two forms. One, I try on a daily basis to keep track of my time for each matter that I work on for the exact period of time that I work on it, at the same time describing the work that I do. Then I add up the time and at various points, to five it to my secretary. My secretary then inputs it into a computer. I receive the computer printout like you see here in which I just review, make sure it's typed correctly and that becomes the computer printout, Defendants' Exhibit 1.*

[ROSENKRANTZ] Q. *Were those records kept on a daily basis?*

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[36]Again, Miller contradicts his earlier testimony about required procedure.

[GERBER] A. Which records?

[ROSENKRANTZ] Q. Your time records.

[GERBER] A. *Yes, they were.*

[ROSENKRANTZ] Q. *Were they in written form?*

[GERBER] A. *Yes, they were.*

[ROSENKRANTZ] Q. *Do you have the time record relative to your reviewing the summons and complaint which is on page 1.3 of the bill with you here today?*

[GERBER] A. *We have 1.3 which is the time record from my billing.*

[ROSENKRANTZ] Q. ***Do you have any other documentation, your original time sheets?***

[GERBER] A. ***My original time sheets I do not have here today.***

Continuing at R.301[P.220L.2-L.7]

[GERBER] A. *Well, as I stated, I have my own personal time sheets, but those are not generated by Miller & Wrubel.*

[ROSENKRANTZ] Q. ***Are they here, those time sheets?***

[GERBER] A. ***I have already testified they're not here.***

The testimony by Miller and Gerber above impeaches the authenticity of the documents in Defendant's 1. Additionally Gerber's testimony impeaches Miller's testimony. Further, the testimony establishes that Respondents willfully disregarded the

subpoena denying Appellant's counsel the opportunity to further impeach Defendant's 1, and testimony by Miller & Gerber.

For the evidence at trial and the reasons stated above, it was improper for the trial court to permit Defendant's 1 or Miller's testimony into evidence.

b. The $4,983 Difference Between The $76,863 Demanded By Respondents At Trial And The $71,880 Demanded On Respondents' Note of Issue Was Improperly Awarded

The trial court improperly awarded Respondents the difference between the amount demanded by Respondents at trial $76,863 and the amount stated by Respondents on their Note of Issue $71, 880. The dollar value of this amount is $4,983[37]*. The trial court's decision here denied Appellant his rights to due process and fair and equal treatment before the law. In the trial court's own words Respondents had failed to move within the time proscribed by law for amendment, thereby denying Respondents any claim they might make for legal fees in excess of the amount stated on the Note of Issue. Citing from the transcript (R.363[P282L18-24]):*

> *THE COURT: . . . . If he [Rosenkrantz] can show me the Note of Issue, you're going to be bound by the figure on the Note of Issue [$71,880.57]. You cannot do that, Mr. Gerber, with all your legal research, knowledge and everything else, you should be well aware of that.*

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[37]$4,983 represents the $76,863.31 demanded at trial less the $71,880.57 (R.367[P.286L.10]) demanded on Respondents' Note of Issue.

And in response to Respondents efforts to amend the amount claimed after the apparant time to do so date elapsed (R.368[P.287L.4]):

> *THE COURT: You say you [Gerber for Respondents] didn't do it and technically now it's* ***improper*** *[emphasis added] . You and Mr. Miller didn't make the motion.*

And again at R.375-376[P.294L.22-P.295L.2]:

> *THE COURT: . . . . the attorneys from Miller & Wrubel should probably have made a formal application before any testimony was taken with regard to this legal fees case.*

Despite the explicit statements by the trial court that Respondents were bound by the amount on the Note of Issue and that amendment was improper at the point of the proceedings at which the issue was raised, the trial court reversed itself and permitted amendment. This amendment was improper, counter to law and must be disallowed.

c. The Trial Court Improperly Awarded Legal Fees Associated With The Subsequent Proceedings To Determine The Exact Dollar Amount Of The Award Of Attorneys' Fees

It was improper for the trial court to award attorneys' fees for work associated with the subsequent proceedings to determine the exact dollar amount of the award of attorneys' fees. According to Respondents, the issue of attorneys' fees was separated from -- and separate from -- the proceedings before the IAS court upon which the award of attorneys fees was made. However, the trial permitted Respondents claims for work on the attorneys' fees proceedings. As indicated below, said monies total $725.50. Citing from Defendants' 1 (R.1305-1306):

11/26/97 MEG Prep. judgment and notice of settlement for same; att'n to prep. same for service and filing; t/cs w/Judgment clerk and Judge Wilk's chamber's re: same; t/c w/Trial Support Office re: filing note of issue [emphasis added];[38]. 3.40

11/26/97 MEG Conf. w/JMM re: all above; prep note of issue [emphasis added]

12/19/97 JMM Conference MEG concerning application for attorneys' fees. 0.30

12/23/97 MEG Prep. note of issue for attorneys' fees hearing for service/filing; drafting client letter. re: same; att'n to filing of note of issue [emphasis added] and notices of entry of judgment, bill of costs and 12/12 Wilk Order 0.40

The above charges were improperly allowed as they related not to the underlying proceedings but to the subsequent proceedings to determine the precise dollar amount of the award of attorneys' fees. From Defendants' 1 it is clear that the last work associated with the IAS proceedings was completed between 12/22/97 and 12/31/97. Citing from Defendants' 1 (R.1308-1309):

12/22/97 MEG Court appearance at clerk's office for entry of judgment and bill of costs; prep. notices of entry for judgment, bill of costs and 12/12 Wilk order; att'n to service of same; drafting client ltrs. re: same. [emphasis added] 3.10

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[38]Entry also indicates other work was done. No breakdown is possible as Gerber and Miller repeatedly stated at trial that they had no ability to breakdown the amount of time spent for different tasks listed under each entry.

12/23/97 CJP indexed and organized court document file 0.20

12/23/97 KAA Indexed & updated court document file 0.60

12/23/97 CJM attended court to file documents 2.50

12/23/97 MEG Prep. note of issue for attorneys' fees hearing for service/filing; drafting client ltr. re: same: att'n to filing of note of issue *and notices of entry of judgment, bill of costs and 12/12 Wilk order.* 0.40

12/29/97[39] *JMM Conference w/MEG concerning service of record on appeal and letter from Kliebert concerning record on appeal.* 0.30

12/29/97[40] *MEG Reviewing appeal record rec'd from Kliebert and fax from Kliebert re: AD1 clerk's rejection of same; att'n to returning same to D. Rosenkrantz.* .30

12/31/97 CJP Receipt and entry of court papers. 0.30

The last action that may have involved the IAS court proceedings was on 12/31/97 with the entry by CJP for "Receipt and entry of court papers". By 12/31/97 all papers associated with the IAS proceedings had been processed, served and filed with the IAS court, Appellant and in Miller & Wrubel's records (see, specifically, 12/23/97 CJM entry, 12/23/97 MEG entry and 12/31/9 CJP entry). Further, the work performed by paralegal Parker ("CJP") on 12/31/97 included work related to the attorneys' fees proceedings (i.e., receipt and entry papers related to attorneys' fees note of issue by Gerber on 12/23/97). Further, Respondents had been contacted by letter by Gerber on 12/23/97 with the status of the proceedings (all IAS court proceedings had concluded with

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[39] As argued elsewhere, award of monies for the the work here was improper because said work was related to the appeal.

[40] As argued elsewhere, award of monies for the the work here was improper because said work was related to the appeal.

Gerber's filing of the last of the IAS court papers on 12/23/87). Action by Miller & Wrubel after this date related to the attorneys' fees proceedings or the appeal. Obviously improper are the charges for legal fees and disbursements on the March 13, 1998 "record" as annexed to the March 12, 1998 invoice as they are charges for either redundant work or for work related to the appeal or the attorneys' fees hearing (R.1311, R.1310 respectively). Those charges and disbursements are listed below:

1/14/98	*MEG*	*T/c w/Karen Selavka at GE re: case status for auditor's report; reviewing and revising auditor's report; conf. w/JMM re: same.*	0.80
2/5/98	*MEG*	*Reviewing fax from K. Selavka re: status of action for company auditors.*	0.10
2/6/98	*MEG*	*Draft fax to K. Selavka of GE re: status of action for company auditors; t/c w/IAS trial support office re:* obtaining date for attys' fees hearing; drafting memo to JMM re: same; t/c w/AD1 clerk's office re: status of appeal. *[emphasis added]*	0.50
2/19/98	*MEG*	*T/c w/P. Salerno re: status of action.*	*0.10*
		Duplicating	*1.80*
		Telephone	*1.25*
		Courier Service	*12.00*
		Local Transportation	*13.50*
		Outside Duplicating	*0 .75*
		Law Journal Information Systems	*52.00*

The value of the legal fees and disbursements here are $300 and $81.30, respectively. Further, the charges listed below are also improper as they include work done on the attorneys' fees proceedings[41]*:*

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[41]Entry also indicates other work was done. No breakdown is possible as Gerber and Miller repeatedly stated at trial that they

12/23/97 MEG Prep. note of issue for attorneys' fees hearing for service/filing; drafting client ltr. re: same; att'n to filing of note of issue *and notices of entry of judgment, bill of costs and 12/12 Wilk order.* 0.40

12/23/97 CJP indexed and organized court document file *0.20*

12/23/97 KAA Indexed and updated court document files *0.60*

12/23/97 CJM attended court to file documents *2.50*

These services are valued at $344 (MEG: $80 .4 hrs; CJM $200 2.5 hrs; KAA $48 .6 hrs; and CJP $16 .2 hrs). When added to the previous amount ($344 + $300 + $81.50), the total of improperly allowed fees and disbursements as related to the subsequent attorneys' fees proceedings is $725.50.

d. The Trial Court Improperly Awarded Legal Fees And Disbursements Associated With The Appeal Of The Award Of Attorneys' Fees

The trial court improperly allowed legal fees and disbursements on Miller & Wrubel's invoices that were associated with the appeal -- taken as of right -- of the IAS court decisions. Miller and Gerber both billed for a conferences and work associated with the appeal of the issues before the IAS court (R.1309). As indicated herein, the value of said monies is $1,774. Citing from Defendants' 1, page 1.37 (R.1302;R.1305; and R.1309):

10/21/97 MEG Drafting opposition to plaintiff's reargument motion; legal research for same; reviewing supplement to *5.80*

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had no ability to breakdown the amount of time spent for different tasks listed under each entry.

plaintiff's reargument motion and plaintiff's notice of appeal[42].

11/06/97 MEG Drafting client ltrs. re: plaintiff's reargument motion and notice of appeal[43]. .30

12/29/97 JMM Conference w/MEG concerning service of record on appeal and letter from Kliebert concerning record on appeal. .30

12/29/97 MEG Reviewing appeal record rec'd from Kliebert and fax from Kliebert re: AD1 clerk's rejection of same; att'n to returning same to D. Rosenkrantz. .30

1/14/98 MEG T/cs w/Karen Selavka at GE re: case status for auditor's report; reviewing and revising auditor's report; conf. w/JMM re: same. 0.80

2/5/98 MEG Reviewing fax from K. Selavka re: status of action for company auditors. 0.10

2/6/98 MEG Draft fax to K. Selavka of GE re: status of action for company auditors; t/c w/IAS trial support office re: obtaining date for attys' fees hearing; drafting memo to JMM re: same; t/c w/AD1 clerk's office re: status of appeal. 0.50

2/19/98 MEG T/c w/P. Salerno re: status of action. 0.10

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[42]Entry indicates other work done. No breakdown possible for as Gerber and Miller repeatedly stated at trial, they had no ability to breakdown the amount of time spent for different tasks listed under each entry.

[43]Entry indicates other work done. No breakdown possible for as Gerber and Miller repeatedly stated at trial, they had no ability to breakdown the amount of time spent for different tasks listed under each entry.

Disbursements from the March 12 invoice:

Duplicating	*1.80*
Telephone	*1.25*
Courier Service	*12.00*
Local Transportation	*13.50*
Outside Duplicating	*0.75*
Law Journal Information Systems	*52.00*

The total value of the fees and disbursements here is $1774 (JMM .3 hrs: $112.50; Gerber 7.9 hrs: $1580; disbursements $81.50[44]) and were improperly allowed by the trial court as said fees related to the appeal.

e. It Was Improper For The Trial Court To Penalize Appellant With Ridiculously Excessive Fees, Costs Associated With Correcting Errors By Respondents, For Educating Respondents' Attorneys', Failures To Act In Accordance With Disciplinary Rules Or Fees For Work That The Court Itself Labeled As "Ridiculous"

1. The Court Improperly Allowed Unnecessary And Shockingly Excessive Fees Associated With The Settlement Of The IAS Court Decisions, Orders And Judgments: $7,743 Just To Prepare And File Orders And Judgments

The trial court was wrong to allow over $7,743 in attorneys' and paralegal fees and disbursements for the routine task of preparing and filing the orders and judgments of the IAS court. This amount is shockingly excessive: over $7,000

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[44]The $381.50 for disbursements overlaps the $381.50 in disbursements cited earlier under the discussion of improper fees awarded for work related to the attorneys' fees proceedings.

just to prepare & file orders and judgments. The first grouping of excerpts below from the "record[s]" in Defendants' 1 indicate that Miller & Wrubel billed $5,942.50 for attorneys' fees for the elementary task of preparing and filing orders and judgments (Gerber $4,780 [(MEG) 23.9 hrs]; Miller $1,162.5 [(JMM) 3.1 hrs]). And, as the second grouping of entries below indicates, Miller & Wrubel billed another $880[45] in fees for work done by paralegals and related to obtaining copies of court papers and related to presenting and filing papers related to orders and judgments[46]. Disbursements on the invoices[47] where these attorneys' and paralegal fees are claimed total $920.90[48]. At best these amounts are obviously and unconscionably excessive and -- at worst -- they are untrue and must be disallowed. Said charges are detailed below:

Attorneys' legal fees associated with the preparation and filing of orders and judgments:

7/21/97	*MEG*	*T/c w/J. Wilk's chambers re: decision reported by NYLJ computer; conf. w/CJP re: same*	*0.10*
7/22/97	*MEG*	*Reviewing default decisions; conf. w/JMM re: same; drafting ltr. to plaintiff re: same; drafting notice of settlement and proposed order for LaFergola motion to dismiss.*	*2.50*
7/23/97	*JMM*	*Conference MEG and review letter to Kliebert and notice of entry.*	*0.50*

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[45] 11 hrs total combined time by CJP and KAA

[46] Entries include other work done. Respondents were unable to breakdown entries at trial.

[47] Disbursements include other work done. Respondents were unable to breakdown the disbursements at trial.

[48] 8/8/97 invoice $144.19 (R.1291); 10/12/97 invoice $134.28 (R.1298); 11/12/97 invoice $367.49 (R.1301); 12/9/97 invoice $128.16 (R.1304);and 1/1/98 invoice $146.78 (R.1307).

7/23/97 MEG Conf. w/JMM re: ltr. to plaintiff re: 0.80 default orders, notice of settlement and proposed order; revising sameatt'n to service and filing of notice of settlement; calendaring dates for same.

9/24/97 JMM Review Wilk's decision dismissing 0.80 action;review letter to clients concerning same: conference MEG concerning further proceedings.

9/24/97 MEG Reviewing decision rec'd from J. Wilk 2.10 denying motions to vacate default; confs. w/JMM re: same; t/c w/CRJ re: w/county clerk; drafting client ltrs. re: decision denying motions to

9/25/97 MEG Drafting order for settlement on 1.90 default decision re: res judicata motion and notice for same.

9/29/97 JMM Conference MEG concerning order: 0.40 attempt to reach Scott Gilbert.

9/29/97 MEG Conf.w/JMM re: proposed order on 0.40 default; revising same; prep. notice of entry of order denying vacatur of default.

9/30/97 JMM Review Order; t/c w/Scott Gilbert. 0.50

9/30/97 MEG T/c w/S. Gilbert re: seeking sanctions 0.50 in proposed order; conf. w/JMM re: same; prep. order and notice of order.

10/01/97 MEG Conf. w/JMM re: settlement of order; 0.30 prep. same for service/filing.

11/25/97 JMM Review Wilk Orders; conference 0.40 MEG concerning preparation of judgment.

11/25/97 MEG Reviewing settled orders on res judicata and personal jurisdiction motions; conf. w/JMM re: settling judgment; legal research re: same; drafting file memo re: same; prep. notice of entry for

settled res judicata order.

11/26/97 JMM Conference MEG; review judgment. 0.50

11/26/97 MEG Prep. judgment and notice of settlement for same; att'n to prep. same for service and filing; t/cs w/Judgment clerk and Judge Wilk's chambers re: same; t/c Trial Support Office re: filing note of issue; 3.40

11/26/97 MEG conf. w/JMM re: all above; prep. note of issue.

12/01/97 MEG Court appearance for instructions from judgment clerk re: settlement of judgment and t/c w/J. Wilk's chambers re: same; conf. w/JMM re: same 3.00

12/03/97 MEG T/c w/J. Wilk's chambers re: status of clarification of order to direct clerk to enter judgment. 0.10

12/04/97 MEG T/c w/J. Wilk's chambers re: status of clarification of order to direct clerk to enter judgment. 0.10

12/08/97 MEG Appearance at NY county clerk's office for attempted settlement of judgment and instructions re: same. 2.10

12/12/97 MEG Preparing revised judgment and affidavit in support of same as per judgment clerk's instruction. 0.80

12/19/97 MEG Preparing revised judgment papers for filing. 0.50

12/22/97 MEG Court appearance at clerk's office for entry of judgment and bill of costs; prep. notices of entry for judgment, bill of costs and 12/12 Wilk order; att'n to service of same; drafting client ltrs. re: same.

12/23/97 MEG Prep. note of issue for attorneys' fees hearing for service/filing; drafting 0.40

client ltr. re: same: att'n to filing of note of issue and notices of entry of judgment. bill of costs and 12/12 Wilk order.

Paralegal fees associated with the preparation and filing of orders and judgments:

7/22/97 KAA	*Retrieved orders from Motion Support office in State Supreme Court*	*0.60*
7/23/97 CJP	*attended State Supreme Court Clerk's office to file Notice of Order.*	*0.70*
9/3/97 KAA	*Filed papers with NY Supreme Court*	*1.00*
9/24/97 CJP	*attended State Supreme Court in attempt to obtain court copy of Judge Wilk's decision.*	*0.70*
9/29/97 CJP	*obtained copy of Judge Wilk's decision at State Supreme Court.*	*0.40*
9/30/97 CJP	*Receipt and entry of court papers*	*0.30*
10/01/97 CJP	*attended State Supreme court house to file court document*	*0.50*
10/06/97 KAA	*Picked up decision and order from Supreme Court.*	*0.70*
10/31/97 CJP	*receipt and entry of court papers.*	*0.40*
11/24/97 KAA	*Retrieved documents from Supreme Court*	*0.80*
11/25/97 CJP	*Pick up orders from State Supreme Records Room.*	*0.70*
11/26/97 KAA	*Indexed and updated court document files*	*0.30*
11/30/97 CJP	*Receipt and entry of court papers.*	*0.20*
12/19/97 KAA	*Indexed and updated court document files.*	*0.10*
12/23/97 CJP	*indexed and organized court document file*	*0.20*
12/23/97 KAA	*Indexed and updated court*	*0.60*

document files

12/23/97 CJM attended court to file documents	*2.50*
12/31/97 CJP Receipt and entry of court papers.	*0.30*

2. The Trial Court Improperly Allowed For Legal Fees That The Court Itself Labeled As "Ridiculous"

It was improper for the trial court to allow legal fees for work the trial court itself labeled as "ridiculous" (R.346[P.265L3-5]). The trial court labeled as ridiculous charges for research related to determining whether a lower court must defer to the rulings of a higher court. Citing from the transcript (R.343-344[P.262L.7-263L.4]):

MR. ROSENKRANTZ: I'll move along.

[Rosenkrantz] Q. Turning to page 1.17. There is an entry of June 23 of '97 by MJP. Who is MJP?

[Gerber] A. MJP ia Matthew J. Peterson. He was a summer associate employed by Miller and Wrubel during the summer of 1997.

[Rosenkrantz] Q. And did you assign him this research?

[Gerber] A. That is possible. I may have assigned it or Mr. Miller may have assigned it. The records may speak for themselves on that.

[Rosenkrantz] Q. Do you know the nature of the research that he did?

[Gerber] A. It says, it's right here in the entry.

[Rosenkrantz] Q. What was the importance of the deference to be given to New York State Court -- there is a misprint --to decisions of the Appellate Division and the Court of Appeals?

[Gerber] A. I don't think it's a misprint. It says research concerning deference to be given by New York Supreme Court to decisions of the Appellate Division and Court of Appeals. I think that is grammatically correct.

And later at R.344-345(263L.22-264L4):

[Gerber] THE WITNESS: The first Kliebert cases he argued were unconstitutional and contrary to law. And I believe Mr. Patterson was researching the fact that in the lowest court in New York, the trial court, it's not possible for the Supreme Court to overrule a decision of the higher court. I think that is an issue he researched.

And later at R.345-346(P.264L.11-265L.24):

[Rosenkrantz] Q. Did you know that prior to the research being done?

[Gerber] A. No.

MR. MILLER: Objection.

THE COURT: What?

MR. ROSENKRANTZ: He articulated that the New York Supreme Court always gives deference to decisions of the Appellate Division of the Court of Appeals.

THE WITNESS: I did not say that. I did not say that.

MR. MILLER: Objection.

THE COURT: First of all, what are we talking about here? Objection sustained. That is a ridiculous question, in the Court's opinion and let the record so state. *[emphasis added]*

[Gerber] Q. Mr. Gerber, on the entry of June 23, 1997, did you believe that research was not necessary?

[Gerber] A. Talking about Mr. Patterson? Did I believe the research was not necessary?

[Rosenkrantz] Q. Yes.

[Gerber] A. Yes, I did.

[Rosenkrantz] Q. Do you know whether or not Mr. Miller ordered that research?

MR. MILLER: Objection.

THE COURT: Sustained. However, Mr. Gerber, the Court would ask only one follow-up question: How could you really believe that research to determine whether or not the Supreme Court of New York had to follow the Appellate Division or Court of Appeals was really necessary. It's obvious that we have to follow that.

Four consecutive entries on the 7/15/97 "record" (R.1289) relate to the work done on this "ridiculous" topic:

6/23/97 MEG Reviewing plaintiff's opposition to motion to dismiss; t/c w/CRJ re: same; conf. w/MJP re: legal research for same. *[emphasis added]* .60

6/23/97 MJP Research concerning deference to be given by N.Y.S.Ct. to decisions of Appellate Division and Ct. of Appeals. 1.5

[49]*(6/24/97* CJP indexed and organized court document file *[emphasis added])* .20

6/24/97 MEG Reviewing plaintiff's opposition papers to motion to dismiss; outlining reply; confs. w/MJP re: legal research re: same 2.80

While the dollar amount of the fees here is small relative to the dollar amount of fees claimed for other unnecessary work, the claims here are indicative of the nature of the work done, and underscores Gerber's lack of understanding of elementary law. It further establishes that Miller shared in this lack of elementary understanding as Miller testified at trial that he reviewed each and every claim for work performed before its billed to the client to determine its "appropriateness". Here the value of the work was $830[50] *(Gerber $680 [MEG 3.4 hrs] Peterson $150 [MJP 1.5 hrs]) and was improperly allowed.*

3. The Cost Of Educating Respondents' Attorneys To Elementary Aspects Of Law And Procedure Was Improperly Allowed

Defendants' 1 and the testimony and statements by Miller and Gerber in open court established that attorneys at Miller & Wrubel, and notably Gerber, were unfamiliar and unknowledgeable with elementary law, court rules, and court

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[49]This entry appears to preserve the continuity of the entries. The fees here are not included in the improper fees claimed here.

[50]Entries include other work done. Respondents were unable to breakdown entries at trial.

procedures necessary to perform such tasks as preparing and filing an order or a judgment or to address such issues as personal jurisdiction, collateral estoppel, res judicata, reargument, etc[51]*. According to Defendants' 1, Gerber -- the principal attorney at Miller & Wrubel assigned to the case -- was incapable of responding to any matter presenting itself in the proceedings before the IAS court without having to dedicate hours of time to research, to telephone and in person conferences with the Clerk of the Supreme, to telephone and in person conferences with Justice Wilk's clerk (IAS court), or in multiple visits to the Clerk's office on the same issue.*

As already indicated in Appellant's original affidavit[52] *179.5 hours of work (valued at $35,082) was claimed by Respondents for the* res judicata *motion; another 48.6 hours of work (valued at $9,578) was claimed by Respondents for work associated with reviewing and responding to Appellant's opposition papers; $6,098*[53] *appears on Miller & Wrubel's "record[s]" as billed for researching and preparing the extension of time to respond; $11, 542 appears on Miller & Wrubel's "record[s]" as billed for researching and preparing the personal jurisdiction motion. And, as cited in Appellant's original affidavit, the trail court refused to accept as reasonable the claims for work here. Subsequently, and as discussed earlier, Gerber (in consultation with Miller and under the supervision of Miller) needed hours of additional research on the filing of orders and judgment values at $7,743 (see previous point heading). Further, Gerber (again, in consultation with Miller and under the supervision of Miller) needed hours of additional research on the remaining issues*

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[51]**See the admonitions of the trial court at.....**

[52]See pages 50-51 of Appellant's original affidavit for *res judicata* and reply to *res judicata*.

[53]See page 61of Appellant's original affidavit for extension of time to respond and personal jurisdiction.

before the IAS court: the orders to show cause and reargument.

The amounts of time spent researching and preparing Respondents' response to Appellant's orders to show cause and motion for reargument are detailed below. They total $3,620 in billed fees per Miller & Wrubel's "record[s]" (orders to show cause: Gerber $1440 [MEG 7.1 hrs], Peterson $180 [MJP 1.8 hrs]; reargument: Gerber $2000 [10hrs]). These amounts are excessive and must be disallowed.

Research on reply to orders to show cause:

8/14/97 MEG Reviewing ltrs. rec'd from plaintiff enclosing ltr. to J. Wilk requesting submission of OSC arguments; conf. w/JMM re: same; conf. w/MP re: legal research re: defaults. .30

8/14/97 MJP Research standard for setting aside of default judgment; meeting w/MEG. 1.80

8/22/97 MEG Drafting opposition affidavits to orders to show cause; legal research for same.

Research to reply to reargument:

10/21/97 MEG Drafting opposition to plaintiff's reargument motion; legal research for same; reviewing supplement to plaintiff's reargument motion; reviewing ltr. from plaintiff to J. Wilk re: reargument; conf. w/JMM re: same. 5.80

10/22/97 MEG Drafting opposition to reargument motion; legal research for same; t/c w/motion support office re: same; conf. w/JMM re: same. 2.90

10/23/97 MEG T/c w/motion support office re: .70 reargument motion; confs. w/JMM re: same; t/c w/D. Rosenkrantz re: same

10/29/97 MEG Revising reargument motion .60 opposition; prep. same for service and filing; t/c w/motion support office re: same.

4.1. Prejudice By Respondents, The Trial Court And -- According To Respondents -- Appellant's Counsel

a. Prejudice By Respondents: Willful Failure To Comply With The Subpoena And Other Misconduct

As presented in Appellant's original affidavit[54] *Appellant was prejudiced by Respondents acts of misconduct in the proceedings before the trial court. Irrevocable prejudice was created by Respondents wanton and willful refusal to comply with the subpoena. This prejudice is grounds for reversal.*

b. Prejudice By The Trial Court

As presented in Appellant's original affidavit[55] *Appellant was prejudiced by the failure of the trial court to follow the law; by the trial court's permitting the willful disobedience of the subpoena by Respondents; and by the trial*

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[54]See Appellant's original affidavit Argument Point I (B) (3) and (4).

[55]See Appellant's original affidavit Argument Point I (B) (3) and (4); see also Argument Point I (A) and (B) (1) and (2).

court's making of a quick mental calculation of the value of the unnecessary work which was grossly inconsistent with the evidence. The trial court further prejudiced Appellant by permitting into evidence Defendant's 1 and the testimony of Mr. Miller; in both instances the credibility and truthfulness of both the facts and testimony therein were impeached by evidence at trial.

c. Prejudice -- According To Respondents -- By Appellant's Counsel

In the proceedings below Respondents have claimed variously that some or all of the prejudice claimed here was not the fault of Respondents or of the trial court but, rather, was Appellant's counsel's fault. Should the Court agree, then -- as Respondents allege -- Appellant was prejudiced by counsel and entitled to remand for a full and fair hearing.

5. Terms Of Injunction Unprecedented And Inappropriate

Respondents misled the courts in the proceedings below by citing precedent for their demand for injunction under the circumstances of the instant case. In the instant case, injunction was granted without explicit adjudication on the merits of such a demand and without the option of pursuing any further action on the underlying facts either with permission of the court or by counsel. There is no such precedent. Respondents citations provide no basis for their demand for an injunction against a pro se Appellant without either the option of Appellant pursuing a future action with representation by counsel or after review by and with permission of the court. In each of the decisions involving a pro se litigant cited by Respondents there is review and discussion by the court on the issue of injunction and the plaintiff is permitted to either pursue future litigation represented by counsel or after review by and with permission

of the court. The courts erred and abused their discretion by not permitting Appellant the option of pursuing litigation either (1) under representation by counsel or (2) with court approval. Injunction under the circumstances of the instant case unprecedented, inappropriate and denies Appellant's constitutional right to fair and equal treatment before the law and due process (5th & 14th Amendments).

Argument Point II.

APPELLANT'S COMPLAINT

Novel Legal Questions Of Grave Social Importance

Landmark Case Of First Impression

The instant action presents legal questions of grave social importance and novel questions never raised before the Court. These questions form a landmark case of first impression. The questions of law involve denials of federal and state constitutional rights by the courts below, conflicts between legislated state laws and federal and state constitutional law, conflicts between legislated laws, conflicts between legislated law and court created rule, conflicts between rulings of the Court of Appeals, conflicts among the appellate divisions, and obvious judicial error. This holds true regardless of whether (1) the Court accepts Appellant's arguments that the instant complaint is permitted under (1) legislated law, (2) court rules and (3) case law (*See* Argument Points II, III, IV & V) or (2) the Court accepts the finding of the courts below that the facts in the instant complaint are "same facts" as those plead in McKoan.

Every instance complained of in this application involves a denial by the courts below of Appellant's rights under the federal constitution to (1) fair and equal treatment before the law and (2) to substantial and procedural due process (5th and 14th Amendments). The explicit and implicit actions of the courts and the explicit and implicit rulings of the courts were without basis in law or based on unresolved conflicts between laws, between court rules, between legislated law and court

created rules, or on case law that is in conflict with the rights guaranteed under the federal and state constitutions. In certain instances the explicit and implicit actions of the courts and the explicit and implicit findings of the courts also denied Appellant his rights to a full and fair hearing, the presumption of truth to facts plead, the right to determination by jury of facts and inferences in dispute, and fair and equal treatment in accordance with legislated law, case law and court rules.

A. The Courts Below Denied Appellant's Right To A Fair And Full Hearing By Failing To Search For The Causes Of Action Contained In The Complaint

Appellant's Complaint appears at pages 615 through 677 of the record. Appellant begs the Court to carefully read the Complaint prior to considering the arguments placed before it by the litigants and to carefully review the text of the Complaint relative to Respondents' assertions. This is necessary since (1) such careful reading was denied Appellant by the courts below and (2) Respondents have misstated the claims and facts in the Complaint before the courts below and said misstatements have mislead and prejudiced the courts below against Appellant. (*See* MISSTATEMENTS OF FACT and PRAYER TO THE COURT).

First and foremost, Appellant was entitled under law and constitutional guarantee to (1) a fair and full reading and review of the Complaint, (2) the presumption of truth on the facts plead (3) liberal interpretation. Those rights were denied Appellant and Respondents concede these denials (*See*, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275; 401 N.Y.S.23 182; 372 N.E.2d 17 "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634; 389 N.Y.S.2d 314; 357 N.E.2d 970 (same); Morone v. Morone, 50 N.Y.2d 633, 634; 389 N.Y.S.2d 314; 357 N.E.2d 970 pleading is to be afforded a liberal construction accepting the facts as

alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory; CPLR 3026: Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of party is not prejudiced.

Neither the courts below nor Respondents offer any rebuttal to this denial of Appellant's right to treatment in accordance with the law.

Further, Appellant was entitled under law and constitutional guarantee to consideration of the facts presented to the courts and contained in the affidavits, exhibits and papers supporting Appellant's claims and put before the courts. Such consideration was denied to Appellant and Respondents concede such denials (*See* Leon v. Martinez, 614 N.Y.S.2d 972 (1994) courts to search to the far corners of the complaint and all the affidavits, exhibits, papers, and oral arguments contained in the proceedings and submitted by both the petitioner and respondents to determined whether the petitioner has a cause of action not whether he has state one); Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634; 389 N.Y.S.2d 314; 357 N.E.2d 970 (same).

In failing to consider whether the facts plead in the Complaint and the facts brought to the courts' attention in supporting documents stated any cognizable cause of action at law, the courts below denied Appellant (1) a fair and full reading and review of Appellants claims (2) denied Appellant the presumption of truth to the facts plead and (3) failed to give Appellant recognition, much less liberal construction to the claims in the complaint. The courts below thereby denied Appellant his 5th and 14th amendment rights to (1) fair and equal treatment before the law and (2) to substantial and procedural due process. Respondents concede to these denials by the courts.

Careful reading and review of the Complaint (R.615-677) and a written decision reviewing in particularity Appellant's claims of denial of constitutional rights by the courts is mandated (*See* Point V (D)). The need for said actions by the Court is underscored by the failures of the court's below to fulfill similar obligations under law.

B. Poor Draftsmanship Not Sufficient Grounds To Deny Interests of Substantial Justice

Appellant's complaint in McKoan was dismissed for poor draftsmanship: Appellant stated conclusions and not facts to support his claims. Appellant's Complaint in General Electric distinguishes itself from the complaint in McKoan as it states "facts" to support Appellant's claims. The courts and Respondents agree with Appellant on this point. The questions then in General Electric are (1) whether after a full and fair reading of the facts in the Complaint and a full and fair reading of the facts in the underlying proceedings the facts stated constitute any cause(s) of action cognizable at law regardless of Appellant's inability to correctly identify them and (2) whether any perceived defect could be corrected by discovery and the filing of an amended complaint after discovery. If said answer by the Court is yes -- and yes is the only answer available upon a full and fair reading of the Complaint and underlying proceedings -- the question of whether or not the "facts" in General Electric are the same "conclusions" plead in McKoan is moot, as the facts state causes of action, or are properly subject to amendment after discovery under law.

C. Appellant Was Denied His Constitutional Right To Trial By Jury On Issues Of Disputed Fact And Disputed Inference.

Accepting, arguendo, that the facts in both General Electric and McKoan are the same -- which they are not (*See* Argument Points II (B) and I (A) (2)) -- the courts below

exceeded the limits of their lawful authority by usurping the role of the jury as provided by the constitution of the state of New York by deciding (1) disputed facts and (2) disputed inferences (*See* Article I, Chapter 2, and Article I (1), (2), (6), (11) and (12)). Disputed issues of fact and disputed inferences are for a jury to decide and may not be decided by the courts as a matter of law.

Appellant and Respondents put facts and inferences before the courts which are in dispute: Respondents contend that Respondents did not engage in the conduct alleged by Appellant and Respondents deny the inferences alleged by Appellant, and Appellant contends that he did not engage in the conduct alleged by Respondents and Appellant denies the inferences alleged by Respondents.

Respondents assert that the disputed facts and disputed inferences do not constitute triable issues and that the courts found no triable issues. This argument is frivolous and any such holding by the courts is obvious error given a full and fair reading of the Complaint in General Electric. Whether Respondents engaged in the conduct alleged by Appellant and disputed by Respondents is determinative of Appellant's causes of action and as such are triable issues.

Implicit in the determinations in General Electric (and McKoan if, arguendo, the Court accepts facts in the General Electric as the same facts plead in McKoan) is that the courts below determined disputed facts and disputed inferences against the Appellant as a matter of law. Such determinations are beyond the authority of the courts and a denial of Appellant's constitutional rights to (1) due process and (2) to fair and equal treatment before the law.

D. Appellant Was Denied His Constitutional Right Fair And Equal Treatment Before The Law Were Facts Are Undisputed

1. Breach of Contract (11th COA)

No law is cited in support of Respondents' opposition to Appellant's breach of contract claim under the 11th cause of action. Respondents do not deny that a valid contract existed between Appellant and Respondents or that they violated the contract. Respondents merely allege that these claims are subject to an arbitration agreement. Respondents no not provide either a copy the alleged agreement or a description the alleged agreement. Appellant has denied the existence of such an agreement. Respondents disputed allegations are not sufficient to support the courts' dismissal of this claim.

2. Conversion (8th COA)

Respondents cite only 1 precedent in support of Respondents' opposition to Appellant's conversion claim under the 8th cause of action. Respondents do not deny the facts stated under the conversion claim or that the items stated were converted. Respondents merely allege that these claims are subject to an arbitration agreement and that the items are insufficiently described. Respondents do not provide either a copy the alleged agreement or a description the alleged agreement. Appellant has denied the existence of such an agreement. Respondents' one citation of law -- Luxonomy (Luxonomy Cars Inc. v. Citibank, 65 A.D.2d 549, 408 N.Y.S.2d 951 (2d Dep't 1978)) does not establish the necessary specificity or legal minimum with which the specific items claimed converted need be described. Luxonomy puts forth no such legal minimum.

Respondents claims also fail to recognize the descriptions of the converted as described in other areas of the Complaint: that Appellant's 401k Account was described as having $73,649.81 (R.643 at 46); Appellant's Kidder Peabody Premium Account (account number 10MIF735143 (R.643 at 47); and at R.644-646 par 50:

"That the defendants General Electric, Kidder Group and Kidder failed to provide plaintiff with a W2 for 1993 until 1995 and have never provided periodic statements of performance and activity, annual performance results, annual performance results of available investment alternatives, or annual election forms for changing and switching among available investment alternatives pertaining to his 401k for 1993, 1994; failed to provide annual vested retirement and pension statements for 1993, 1994, 1995; failed to provide plaintiff with instructions and forms to activate Cobra coverage and failed to provide instructions and forms to make insurance claims under Cobra for 1993, 1994, 1995; failed to provide I.R.S. 1020 forms for 1993 and 1994 and monthly statements from April 1993 through May 1994 for plaintiff's Kidder Peabody Premium Account; failed to provide unreimbursed expense forms and receipts submitted in 1994."

Said failures continue to this very day.

Respondents claims of insufficiency are unsupported by their 1 citation of case law (Luxonomy) and in conflict with legislated law:

-- Under CPLR 3026: Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

-- Under CPLR 3025 (b): Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just

-- Under CPLR 3101 (a) (Scope of Disclosure): Generally. There shall be full disclosure of all material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ..

Appellant approached the IAS court for permission to engage in material and necessary discovery (CPLR 3101 (a)) in the event that the court should find that the converted items managed and controlled by Respondents failed to provide the minimum specificity required by law (i.e., Appellant's Kidder Peabody [emphasis added] Premium Account (money fund) controlled by Respondents, Appellant's 401K account controlled by Respondents, monthly quarterly and other periodic statements of account from accounts controlled by Respondents; retirement, benefit and pension accounts controlled by Respondents: his 1993 I.R.S. W2, and 1993 I.R.S. 1020 statements for said Kidder Peabody Premium Account all items controlled by Respondents). Appellant also asked the courts for instruction on the legal minimum standard of description as Respondents 1 citation of law (Luxonomy) provided none and for permission to amend (CPLR 3026; CPLR 3025 (b)). The courts failed to grant Appellant the material and necessary relief requested prejudicing Appellant's ability to satisfy this alleged deficiency.

This relief was material and necessary in rebuttal of Respondents claim and obligation of the courts under law. While the IAS court could have required "submission of evidentiary support for a proposed amended pleading", it did not (*See* American Dental Coop. v. Attorney Gen. of N.Y., 127 A.D.2d 274, 514 N.Y.S.2d 228 (1st Dep't 1987)). Implicit in the IAS court's failure to require further submission of evidentiary support, and the IAS court's failure to allow necessary discovery and provide instruction, is a prejudicial finding against Appellant that none of the items claimed were converted. This is effective summary judgment without notice in violation of legislated law under CPLR 3211 (c) and (d):

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b) , either party may submit any evidence that could be properly considered on a motion for summary judgment. Whether or not the issue has been joined, the court, after adequate notice to the parties, may treat the motion as one for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts available to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) [*See* Respondents' April Motion and LaFergola Motion] that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained and disclosure to be had [emphasis added] and make any other order as may be just.

3. Fiduciary Duty, Contract and Implied Contract Claims (9th/10th COA)

Respondents do not deny the facts alleged under Appellant's fiduciary duty and implied contract claims. Respondents do not deny that they had obligations to Appellant under contract and implied contract on the 9th cause of action (e.g.., Kidder Peabody Premium Account [money fund]) only that they had no fiduciary duty. Respondents do not deny that they breached an implied contract with Appellant on Appellant's 10th cause of action but only that they owed Appellant no fiduciary duty. Respondents do not deny that they violated fair dealing law.

Respondents cite no applicable law in their opposition to the fiduciary duty claim. Respondents cite Serow and Wilson and business law as purporting to establish that there is no "fiduciary duty" between Appellant and Respondents (Serow v. Xerox Corp., 166 A.D.2d 917, 560 N.Y.S.2d 575 (4th Dep't 1990); Wilson v. Rensselaer & Saratoga R.R., 184 Misc. 218, 52 N.Y.S.2d 847 (Sup. Ct., Rensselaer), aff'd, 268 A.D. 1076, 53 N.Y.S.2d 306 (3d Dep't 1945); 14A N.Y. Jur. 2d, Business Relationships, Section 828 at 525-26 (1996)). Serow, Wilson and the law cited deal only with a narrow employer-employee relationship and not one as in the instant case where Respondents solicited monies and entered into contractual agreements with Appellant outside their role as employer, and which are regulated by federal and state law. Unlike the situation in Serow and Wilson, Respondents here were not only Appellant's employers, but solicited, maintained and controlled Appellant's monies in an investment business under federal and state regulation and under contract agreement with Appellant (Kidder Peabody Premium Account [money fund] [account number 10MIF735143]); Respondents maintained and controlled Appellant's pension funds and said pension funds were subject to federal and state regulations and to the rules under ERISA and under contract agreement with Appellant; Respondents controlled and had responsibility to provide Appellant federal and state tax documents, and the provision and management of such tax documents were regulated by federal and state tax law; Respondents interference with, opening and reading of, destruction of, and conversion of Appellant's sealed correspondence is subject to federal postal law and regulation, Appellant's medical benefits are subject the laws and rules under COBRA; Appellant's 401k with Kidder Peabody was subject to federal and state law. Said 401k investment funds were solicited, managed and controlled by Kidder. Respondents do not deny that the claims against Respondent General Electric violate SEC laws and regulations or the claims against the Respondents are violations of state and

federal law. Respondents do not deny that the facts cited here constitute a wrong against Appellant, violate state and federal law even though Appellant may not be able to cite said laws with particularity.

4. Assault And Negligence

Causes of action for assault and negligence are stated in the facts contained in the Complaint, although they are not given explicit point headings. Appellant directs the Court to his arguments under claims for emotional distress (Argument Point II (E) (1) & (4)) and footnotes under Argument Point II (E) (4) for his assault claims[56] and the facts in the Complaint under Appellant's claims for Breach of Contract (11th COA) and Fiduciary Duty, Contract and Implied Contract Claims (9th/10th COA). Respondents do not deny these facts; Respondents have never argued that Appellant failed to state causes of action for assault and/or negligence; Respondents have never argued that Appellant failed to state a cause of action for emotional distress issuing from the assault and negligence claims.

E. Conflicts Of Law On Causes Of Action Where Facts And Inferences Are Disputed

1. Emotional Distress Claims: Landmark Case Of First Impression

Appellant's emotional distress claim is based on all the "facts" stated under the 19 explicit causes of action stated in the Complaint. The body of facts alleged is unprecedented in New York law. Never before has the Court of Appeals or the courts below had either (1) the magnitude of the number of claims, (2) the confluence of claims of wrongful conduct, or (3) the specific

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[56]Eg., "touching the person of plaintiff without his specific consent or request" and "forcing plaintiff's vehicle off the road".

claims enumerated directed against a claimant. Never. Appellant claims form a landmark case of first impression. Appellant again begs the Court for a fair and full reading of the Complaint, the presumption of truth for the facts alleged, and for the Court to search far and wide to see if the facts stated in the Complaint constitute any cause of action cognizable at law (*See* Argument Points II (A) & (B).).

While Appellant claims are based on all the facts stated in the Complaint, Appellant directs the Courts attention to the excerpt from the Complaint under FACTS AND PROCEDURAL HISTORY [Factual Background Of The McKoan Action And General Electric Action]. While Respondents have denied some of the facts under Appellant emotional distress claim, Respondents have never denied that the facts cited here do not appear in any other litigation or that said facts are sufficient to support a claim for emotional distress claim on its own right, or that said facts are sufficient to support a claim of emotional distress coupled with the other facts in the Complaint constituting a cause of action for assault ("touching the person of plaintiff without his specific consent or request" and "forcing plaintiff's vehicle off the road").

Respondents explicitly argue only that Appellant's emotional distress claim fails because Appellant cited the wrong law (federal law, not state law) in support of his emotional distress claims (*See* Stern v. New Haven Community Schools, 529 F. Supp. 31, 34 (E.D. Mich . 1981) (emotional distress claim not cognizable under Chapter 1983)). Respondents make no argument that the facts stated fail to satisfy Appellant's emotional distress claim under state law which is applicable whether or not Appellant specifically cited it (*See* also Argument Point II (G) (2) & (4) b).

Appellant cites Levine, Onassis, Long, and Nader as establishing that the facts cited are sufficient to support a claim for emotional distress under state law in their own right or as

coupled with allegations of assault (*See* Levine v. Gurney, 149 A.D.2d 473, 539 N.Y.S.2d 967 (2d Dep't 1989) (upon which alone the Appellant's claim for emotional distress should have been granted), Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647, (1970), Galella v. Onassis, 353 F.S. 196 (1972), Galella v. Onassis, 487 F.2d 986 (1973), Galella v. Onassis, 533 F.S. 1976 (1982), Long v. Beneficial Fin. Co. of N.Y., 39 A.D.2d 11, 330 N.Y.S.2d 664 (1972), and Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647, (1970), (*See* Appellant's arguments under Argument Point II (G) (2) [emotional distress claim in McKoan]). The facts stated by Appellant in the Complaint go far beyond the facts stated in cited law and set a new standard for outrageous conduct.

2. Defamation And Injurious Falsehood: False And Defamatory Statements To Non-State Actors

Respondents have never denied that a cause of action for injurious falsehood (as distinct from a cause of action for defamation) was stated in the facts of the case. Defendants have only argued that a cause of action for defamation was not stated. Respondents arguments fail here as case law cited by Respondents is inapposite to their arguments and establishes Appellant's claims for defamation and injurious falsehood. Respondents arguments also present to the unresolved question of whether false and defamatory statements manufactured and broadcast to persons who are not state actors before they are broadcast to state actors are immune.

Appellant's defamation and injurious falsehood claims are based on the broadcast and manufacture of false and defamatory statements about Appellant by Respondents to persons other than the persons in the New York County District Attorneys office and occurring before the broadcast to the District Attorney. Respondents have no protection for such false and defamatory statements. Respondents (and the courts)

cite no case law establishing that false and defamatory statements made to persons other than state actors and before being made to state actors is protected speech. Respondents misstate Appellant claims as alleging only false statements made to the District Attorney and which later were disseminated by the District Attorney to the press.

Respondents misled the courts below (1) by citing law inapposite to their arguments and (2) by misstating the facts. Respondents argue that Appellant's defamation claim fails because Appellant cited the wrong law (federal law, not state law) in support of his emotional distress claims (*See* Zarcone v. Zarcone, 78 A.D.2d at 78, 434 N.Y.S. 2d at 442 ("section 1983 affords no right of action for defamation"). Respondents also argue in opposition to Appellant's defamation claim: (1) that Appellant allegedly "admits making the threatening statement to McKoan", (2) "qualified immunity [exists] for statements to the People applies in view of the [appellate courts'] probable cause holding" (3) "there is no liability for statements in newspapers Respondents do not control" citing, respectively, Han v. State, 186 A.D.2d 536, 537, 588 N.Y.S.2d 358, 360 (2d Dep't 1992), Toker v. Pollack, 44 N.Y.2d 211, 219-21, 405 N.Y.S.2d 1, 4-6 (1978) and, Hoffman v. Landers, 146 A.D.2d 744, 747, 537 N.Y.S.2d 228, 231 (2d Dep't 1989). Appellant relies on state law if the Court finds that Appellant has no federal claim. As a claim for defamation under state law, Respondents arguments establish Appellant's claims: (1) Appellant never admitted to making any threatening statements and the courts never ruled that any conduct or statement by Appellant was threatening, Respondents efforts to mislead the courts notwithstanding, and (2) there is no immunity for false statements manufactured and broadcast to persons not belonging to the District Attorney's office before they were broadcast to the District Attorneys' office (and Respondents cite no case law to the contrary). (*See* also Argument Points II (F) & (G): probable cause holding was obvious error). Appellant claims are not that Respondents printed the false and defamatory statements in newspapers, but

that Respondents manufactured and broadcast false and defamatory statements to non-state actors prior to their broadcast to the District Attorney.

Further, Respondents have never denied that the alleged statements were false. To avoid perjuring themselves for a second time, Respondents attempt to rebut this allegation by resorting to the use of a few very carefully chosen words. While never denying the statements were false, Respondents merely state that they signed a statement that bore the legend "False statements made herein are punishable as a Class A misdemeanor pursuant to section 210.45 of the penal law".

3. Prima Facie Tort: Acts 'wrong on their face' And Without Legal Motive

Case law cited by Respondents in the proceedings below is inapposite to Respondents' arguments and establishes Appellant's claim. Respondents arguments also pose to the Court the unresolved question of whether wrongful activities constitute a legal and proper business motive.

Respondents argue that Appellant's prima facie tort claims must fail because some or all of the facts cited under the prima facie tort claims are also cited alone or in combination with other facts under other causes of action (*See* Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dep't), aff'd, 66 N.Y.2d 946, 498 N.Y.S.2d 779 (1985) and Andrews v. Steinberg, 122 Misc. 2d 468, 471 N.Y.S.2d 764 (Sup. Ct., N.Y. 1983). This is patently false. Gertler and Andrews argue the opposite position: the same facts may be cited to support a number of different claims. Contrary to Respondents claims, there is no case law that prohibits the same facts from being claimed under more than one cause of action. The holding in Andrews is inapposite to Respondents' arguments:

> "Allegations might conceivably indicate the existence of multiple theories of recovery. . . the pleadings failure to satisfy the technical requirements for stating one theory. . . is not necessarily fatal". (emphasis added)

Respondents reliance on Andrews and Gertler to support their claims is also a reliance on conflicting law unresolved by any decision of the Court of Appeals. Respondents use Gertler to allege "prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs" while using Andrews which establishes:

> "Difficulty in classifying a pleading is not an acceptable excuse for declining to adjudicate the issues it raises. Semantics alone should not determine whether a wrong can be redressed. Moreover, under modern pleading practice, a complaint should be deemed sufficient if it sets forth an adequate factual basis for determining that some legal relief can be validly sought on one or more permissible theories." (emphasis added)

A similar conflict of laws unresolved by any decision of the Court of Appeals presents itself in Respondents reliance on Curiano v. Suozzi, 63 N.Y.2d 113, 480 N.Y.S2d 466 (1984) in the face of Andrews arguing that unlawful acts may not constitute a basis for prima facie tort. Respondents cite Curiano as establishing:

> "Prima facie tort may not be based on alleged criminal acts because prima facie tort must allege malicious conduct that would otherwise be lawful."

Yet, Andrews -- upon which Respondents also rely -- holds that:

> "If unjustified intentional injury caused by an otherwise legal act can be actionable, then a fortiori, an unjustified, intentional injury caused by an illegal activities should be actionable. Those cases assuming that the Defendant's act must be otherwise legal to be actionable are unduly restrictive and fundamentally inconsistent with the underlying purpose of *prima facie* tort doctrine." (emphasis added)

And the court in Andrews (pg. 770) cites the decision in Penn-Ohio Steel Corp. v. Allis Chalmers Manufacturing. Co., 7 A.D.2d 441, 184 N.Y.S.2d 58 in support of its ruling:

> "By its nature, a false statement intentionally made is wrongful [emphasis added]. If it inflicts material harm upon another, which was or should have been in the contemplation of the actor, and it results in actual damage to the plaintiff's economic or legal relationships, an action may lie. . . It logically follows that to sustain a complaint, it is not necessary that the pleading must allege that the defendant was solely motivated to injure the plaintiff. It is enough if the falsehoods charged were intentionally uttered and did in fact cause the Plaintiff to suffer actual damage in his economic or legal relationships. *Ibid.* at 444, 184 N.Y.S.2d 58"

Respondents assert (1) that Appellant alleged a legal business motive for Respondents wrongful acts against him and (2) Respondents assert that they cite case law establishing that the facts plead in Appellant's complaint constitute a legal business motive (*See* Andrews, Curiano v. Suozzi, 63 N.Y.2d 113, 480 N.Y.S2d 466 (1984); WFB Telecommunications, Inc. v. NYNEX, 188 A.D.2d 257, 590 N.Y.S.2d 460 (1st Dep't 1992); Barnum v. Millbrook Care Ltd. Partnership, 850 F. supp. 1227 (S.D.N.Y.), aff'd , 43 F.3d 1458 (2d Cir. 1994)). This argument is without merit. Appellant never alleges any proper business motive for wrongful acts Respondents directed

at him. There is no case law establishing that the specific wrongful activities claimed of by Appellant and engaged in by Respondents in his prima facie tort claims and labeled as illegal and wrongful activities under the rubric of "profits at any cost" constitutes a legal business motive. Appellant ascribes no legal activities or motives to Respondents as a reading of his claims establishes.

Under their arguments in opposition to the prima facie tort claims, Respondents label all of Appellant prima facie torts claims as claims for conspiracy, malicious prosecution and emotional distress. This is a misstatement of the facts. Contrary to Respondents contentions here, no cause of action for conspiracy to commit tort is claimed by Appellant, despite Respondents' misstatement. All the facts and allegations under the malicious prosecution claim contain some but not all the facts and allegations plead under the 6 separate prima facie tort claims. The emotional distress claim is based, among other things, on facts and allegations not made under the 6 separate claims for prima facie tort. Even under the law cited by Respondents (Andrews) the courts has the responsibility to consider all the possible causes of action -- whether similar or different -- (i.e., in Andrews: defamation, injurious falsehood, and prima facies tort considered *simultaneously* by the court) and (as in Andrews) while the circumstances of the specific case fail to satisfy one cause of action, they may be sufficient to satisfy requirements of another cause of action. Since not one of the 6 separate prima facie tort claims alleges all the facts contained in the malicious prosecution or emotional distress (and no claim for conspiracy to commit tort is plead), or alleges them all against the same Respondents, it cannot be said that the prima facie tort claims are the "catch-all alternative" (*See* Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dep't), aff'd, 66 N.Y.2d 946, 498 N.Y.S.2d 779 (1985)).

4. Obstruction, Privacy And Other Constitutional And Civil Rights Claims

(18th, 7th & 14th, and 12th through 19th COA)

Respondents dismiss Appellant's constitutional and civil rights arguing that the constitution and the specific civil rights laws cited do not either apply to Appellant or do not afford the protections claimed. Respondents do not claim that all the facts cited fail to constitute a violation of law recognized by other laws. Said constitutional claims incorporate some or all the claims and some or all of the facts stated in the Complaint. Said claims and facts state wrongful conduct by Respondents directed at Appellant. The implicit finding by the courts below was that the facts do not state any cause of action recognized under law is obvious error. Appellant is not an attorney, has no legal training and admits that he may not have the ability to properly identify the correct law or laws violated and depends of the Court for a full and fair review of the facts and claims in the Complaint and in the proceedings below.

Respondents also claim that the constitutional and civil rights claims do not state a causes of action under state tort law. Appellant refutes those claims below (*See* Points II. E. (4) a & b) and discusses here only the privacy and obstruction claims (7th & 14th, and 18th COA)

Included in Appellant's claims for privacy invasion and obstruction is among other things:

> Defendants . . . intercepted, accessed and recorded plaintiff's conversations by unlawful wiretapping and the use of mechanical and electronic . . . . (R.625)

These facts appear first in the Complaint under Appellant's prima facie tort claims and later are incorporated in the privacy claims. Respondents incredulously argue that they had a legitimate business purpose for engaging in these activities under their arguments in opposition to Appellant's prima facie

tort claims. Obviously, these activities are wrong and there is no legitimate business motive for engaging in them. And, using Respondents' own citation of Andrews, since Respondents were never found guilty of such charges in a criminal proceeding, such activity forms a proper basis for a prima facie tort claim (*See* Argument Point II (E) (3)). The question to this Court is whether or not it is time for the courts to recognize under tort law a claim for privacy invasion where Respondents ". . . recorded plaintiff's conversations by unlawful wiretapping and the use of mechanical and electronic devices. . .". Such a claim should be recognized under common law just like the courts have recognized under common law torts for emotional distress, assault and battery, and fraud.

Similarly, it is argued that the facts stated in the excerpt from the Complaint under FACTS AND PROCEDURAL HISTORY [Factual Background Of The McKoan Action And General Electric Action] alone or in conjunction with other facts and claims in the Complaint and the proceedings below -- warrant recognition as a cause of action, if, as implicit in the proceedings below and explicit in the arguments of Respondents, these acts are not wrongful under present law. The question to this Court is whether or not it is time for the courts to recognize under tort law a claim for obstruction and interference where Respondents:

> ". . . dashed in front of and at plaintiff in a threatening manner, confronting plaintiff at extremely close range, stepping and charging into the path of plaintiff and impeding thereby his lawful movement with their persons and their automobiles; suddenly jumping out and charging at plaintiff from cars, buildings and other concealed places; touching the person of plaintiff without his specific consent or request[57], closely walking behind beside or in front of plaintiff on public streets

[57]Supporting assault claim.

and places; running after and chasing plaintiff into oncoming traffic, down streets, down flights of steps, onto subway platforms and into oncoming trains.

. . . blocked, obstructed and interfered with plaintiff's access, entry, movement and egress to streets, buildings and other public places . . . .

. . . When plaintiff walked rapidly, defendants agents . . . ordered plaintiff to "Walk slower or I'll put a bullet in your leg".

. . . surrounded and chased plaintiff in motor vehicles on public highways in New York State at speeds in excess of 55 miles an hour, following at distances of less than 1 car length and forcing plaintiff's vehicle off the road[58].

. . . blocked, obstructed and interfered with plaintiff's access to and egress from cabs and livery service vehicles.

. . . took photographs of, and made daily written notes of and made sound recordings of plaintiff's conversations in and outside his homes.

. . . for the period between December 1993 through February and April 1994 this following and interference with plaintiff's movements and associations was overt and visible to passersby at all times. The aforesaid actions caused passersby to stop and stare at plaintiff and make comments to plaintiff causing embarrassment and torment."[59] (R.627-629)

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[58]Further support of assault claim.

[59]Respondents do not deny any of these facts nor do they allege them to be mere conclusions. Appellant submits to this Court

a. The Constitutional Claims: Conflicts Of Laws

Appellant's constitutional claims (12th through 19th) are of conduct by state actors whose conduct was so inextricably intertwined with Respondents actions so as to be inseparable (12th through 15th). Respondents do not and cannot deny that the actions by the state were so inextricably intertwined with the actions of the Respondents so as to be impossible without them. Respondents rely on Shad and Bevilacque as denying Appellant's causes of action (Shad Alliance v. Fulton County Sheriff, 63 F.3d 110 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); Bevilacque v. Ford Motor Co., 125 A.D.2d 516, 509 N.Y.S.2d 595 (2d Dep't 1986)). Shad and Bevilacque deal with only actions by private individuals whose actions are not inextricably intertwined with actions by the state. Respondents cite no law prohibiting Appellant's constitutional claims under

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that the facts plead in the complaint are sufficient to meet the strict standard of outrageous conduct required by common law precedent. The Court is asked to contrast this to Respondents own description (R.565, par. 19) of Appellant's emotional distress claim under their statement of the facts in their April Motion:

> "The Supreme Court dismissed plaintiff's emotional distress claim because plaintiff's allegations of defendant's conduct, "includ[ing], among other things, following him, conducting intensive surviellance of him, and diverting his mail" failed to meet the standard of outrageous conduct required for an emotional distress claim".

Further, this Court is asked to rule on whether said claims state "facts" not contained in the McKoan complaints, and whether said "facts" are indeed "facts" or merely the "bare legal conclusions" this Court found in the McKoan complaint.

the circumstances of the case. Respondents cited cases are not even remotely similar to the facts in the instant case. The instant case is based on actions by the state whose conduct is so inextricable intertwined with Respondents manufacture and broadcast of false statements so as to be impossible without them.

To the extent Respondents rely on Shad and Bevilacque in opposition to Appellant's 7th and 18th, and 17th and 19th causes of action said citations are in conflict with the law in Galella and Nader (Galella v. Onassis, 353 F.S. 196 (1972); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Galella v. Onassis, 533 F.S. 1076 (1982); Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2D 647, (1970)). Said conflicts require review by the Court of Appeals.

b. The Civil Rights Claims: Conflicts Of Laws On False Arrest And False Imprisonment, Abuse of Process, Malicious Prosecution, Emotional Distress And Defamation (12th, 15th, 13th & 16th COA)

In arguments denying Appellant's 12th through 15th, and 17th and 19th causes of action, Respondents do not claim that Appellant does not have causes of action on the facts alleged but only that Appellant has no cause of action under the specific law Appellant cited - 42 U.S.C. Chapters 1983 and 1985 -- or that the Constitution does not afford such protections per se (referring to the 15th, 17th & 19th COA) -- not that the facts do not state a cause of action cognizable at law. Respondents do not rebut the existence of causes of action under state law and fail to rebut Appellant's protections under constitutional law or under state law. Respondents cite Sadler as denying Appellant's claims under the 42 U.S.C. Chapters 1983 and 1985 because -- as Respondents claim -- the civil rights claimed violated by Respondents may not be claimed

under the law cited by Appellant, because Appellant is not a member of a "discrete segment[] of society, such as [a] racial group [or applicable]. . . to Appellant's individualized claims, which have no class-based component" does not rebut the existence of the same protections under constitutional law.

False Arrest And False Imprisonment/Abuse of Process. In denying Appellant's false arrest and imprisonment and abuse of process claims Respondents rely solely on the decision of the appellate court in McKoan. Said law cannot form the basis for the decision in the instant case since the decision violates law and Appellant's constitutional rights (*See* Argument Point II (G)). The appellate court had an obligation to reconsider its judgment in McKoan and renew or re-open the case based on new evidence it found ("facts") and the obvious inconsistency between the appellate court's findings and the law. The appellate court failed in that responsibility. Similarly the IAS court below had an opportunity to reconsider its decisions and order a renewal or re-opening based on the new evidence it found ("facts"). Respondents cited law -- Singer and Turecki -- form no legal basis for the denial of the Appellant's claims since neither case dealt with the issue of probable cause being founded upon facts unknown to the accusers at the time the accusations were made -- as in the instant case -- and where the basis of the appellate court's finding of probable cause was based on facts not known to Respondents at the time they manufactured and broadcast the intentional false statements about Appellant (Singer v. Fulton County Sheriff, 63 F3d 110 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); Turecki v. Turecki, 220 A.D.2d 353, 633 N.Y.S.2d 123 (1st Dep't 1995)). Not only were they not known, they had not even happened. Further, neither Singer nor Turecki deal with the issue of the court finding of probable cause based on disputed inferences and the denial of due process by the courts by their determination, as a matter of law, disputed inferences which can only be determined by a jury (*See* Argument Points II (C) & (G)).

Malicious Prosecution. Similarly, Respondents rely solely on the decision in McKoan denying Appellant's malicious prosecution claim and cite only the decision in Russell as a basis for denial (Russell v. Smith, 68 F.3d 33 (2d Cir. 1995)). Russell cannot form a basis for the decision in the instant case (or in McKoan), in that it does not deal with the suggestion of innocence created when -- as Respondents themselves state -- the court denied the prosecution's timely request to amend its complaint so as to remedy deficiencies and avoid either the escape of a believed perpetrator or the waste of judicial resources on an appeal or other judicial action. Such a conclusion is unreasonable and flies in the face of common sense as well as amounting to an accusation of judicial misconduct and obstruction of justice by the misdemeanor court, i.e., the misdemeanor court believed the Appellant guilty of a crime but intentionally failed to amend the complaint or allow the People permission to amend the complaint (*See* Argument Point II (G) (1)). The misdemeanor courts actions are consistent with a suggestion of innocence and inconsistent with belief that the Appellant was guilty of any penal law violation.

Further, as argued earlier, Respondents' reliance upon this Court's finding of *'probable cause'* cannot bar the instant malicious prosecution claim because, besides being obvious error, there is no case law establishing that facts not known to Respondents at the time Respondents manufactured and broadcast the intentional false statements against Appellant can be the basis for probable cause or that events (facts) that had yet to occur can be the basis for probable cause (*See* also Argument Point II (G) (1)).

Defamation And Emotional Distress. Appellant directs the Court to the arguments under Argument Point II (E) (1) & (2)).

F. Improper Probable Cause And Favorable Termination Findings In McKoan Do Not Bar Causes Of Action In The Instant Complaint

The holdings by the courts in McKoan that (1) that Respondents had probable cause for manufacture and broadcast of false statements about Appellant and (2) the denial of a favorable termination under the specific circumstances of the case are bad law. Said determinations denied Appellant his constitutional rights to due process and fair and equal treatment before the law in that the courts (1) denied Appellant his right to have disputed facts and disputed inferences from undisputed facts decided by a jury, (2) conflict with existing case law, and (3) are obvious error. And said bad law -- unconstitutional law -- can not be a basis for barring the claims in General Electric. (*See* also Argument Point II (G)).

1. The Finding Of '*probable cause*' On *Unknown* Facts And *Disputed* Interferences Violates Appellant's Constitutional Rights

a. The '*probable cause*' Findings Violate Law And Common Sense

In McKoan, the appellate court in upholding the decision of the IAS court found that:

> "documentary evidence from plaintiff's criminal case, including plaintiff's admissions with respect to his alleged [emphasis added] threatening statements and behavior, the discovery of weapons in one of his homes, and the court orders directing plaintiff to undergo psychiatric treatment and to stay away from Kidder Peabody employees..."

amply supported

> "...the reasonableness of, and therefore probable cause for, defendants' decision to report plaintiff's conduct to the District Attorney..."

All of the facts referred to here by the appellate court had *not even occurred* until *after* Respondents made their knowingly false statements to the state actors. It is impossible for facts that (1) had not even occurred at the time Respondents made their knowingly false statements and which (2) were unknown to Respondents at the time they made their knowingly false statements to have given them *'probable cause'*.

There is no law that provides for the finding of 'probable cause' for the manufacture and broadcast of intentionally false statements -- or for any other act -- based on facts that (1) occurred *after* Respondents manufactured and broadcast their knowingly false statements and (2) of which Respondents had no knowledge of at the time of manufacture and broadcast. One need not turn to the law for such an obvious conclusion. Common sense and simple logic tell you that this is impossible for a person to base his or her actions on matters they have no knowledge of and which have yet to occur.

The alleged "discovery of weapons[60] in one of his homes, and the court orders directing plaintiff to undergo psychiatric treatment and to stay away from Kidder Peabody employees" occurred after Lafergola and McKoan made their statements to the District Attorney's investigator, therefore, they could not have influenced in any way Respondent's decision or contributed to any *'reasonableness'*. It is not *'reasonable'* for facts not known to a person to influence his decisions. Further, Respondents never allege to have been in possession of this knowledge at any time prior to the release of the misdemeanor proceedings in May *1995* (the manufacture

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[60]There was no weapons offense charged against Appellant.

and broadcast of the false statements was made in 1993). That leaves only "...plaintiff's admissions with respect to his alleged [emphasis added] threatening statements and behavior..." and "...documentary evidence from Appellant's criminal case...". First, the "...admissions with respect to his alleged [emphasis added] threatening statements and behavior...": Appellant never made any admissions of having made threats or engaged in threatening behavior. No court has ever found that Appellant threatened Respondents or engaged in conduct against Respondents that was "threatening". Appellant specifically denied making any threats or engaging in any threatening behavior and said denials are contained in the written record of the misdemeanor proceedings. Appellant made one remark and gesture to McKoan as embodied in the misdemeanor complaint and Appellant has denied that either the remark or gesture was a threat. No court has ever found that the remark or gesture were threatening and no court could make such a finding a matter of law on these disputed facts and inferences (New York Constitution: disputed facts and disputed inferences are for a jury to decide). Further, whether or not the statements alleged in the complaint -- other than the one already recognized -- (1) were made by Appellant, and (2) whether any statements -- including the one recognized -- constituted threats are triable issue of fact for a jury, not the courts to decide. There is no law which establishes that the parts of the misdemeanor record pertaining to these words and the one gesture were -- as a matter of law -- threatening. Whether these words and the one gesture were threatening is controverted, and, under law and constitution, triable issues of arising from controverted facts or disputed inferences are to be determined by a jury and not the courts, the courts actions in McKoan notwithstanding.

The appellate court cites Colon v. City of New York, 60 N.Y.2d 78, 468 N.Y.S.2d 453 (1983), as supporting its ability to decide as a matter of law triable issues of fact. Colon provides no such basis. Colon does not hold that probable cause can be had by facts unknown and which occurred after the actions for which they allegedly created probable cause. There is no law establishing that probable cause can be established by facts unknown and which occurred after the actions for which they allegedly created probable cause.

Probable cause consists of such facts and circumstances as would lead a reasonable prudent person in like circumstances to believe another person guilty (*See* Colon). As discussed earlier, the facts and circumstances here are controverted and constitute a triable issues of fact for a jury. It is for the jury to determine the facts and circumstances upon which it would apply this prudent man rule. The courts cannot, as a matter of law, decide controverted facts, the actions of the courts in McKoan notwithstanding.

Further, a determination on whether the Respondents acted with probable cause is a separate question from whether or not the District Attorney acted with probable cause. It is believed that the appellate court confused the standard by which probable cause could be established for the Respondents with the standards by which probable cause could be established by the District Attorney. The question of whether a prudent man in the same circumstance would have acted as the Respondents acted requires first and foremost a determination of what the facts and circumstances were; if those facts and circumstances, and any reasonable inferences that may be drawn therefrom, are in dispute, then it is a jury question. Here the courts were faced with a jury question and

denied petitioner his constitutional right to have triable issues of fact decided by a jury and not the courts.

In making the above determination, the courts must also take into account the admissions by Respondents that they intentionally manufactured and broadcast the false statements about Appellant.

No claim has been brought against the District Attorney's office or any person in that office since they were victims of an intentional fraud perpetrated by the Respondents. The claims in this suit are brought against the entities that brought about state action against the petitioner by intentional fraud, thereby making the state the instrument Respondents used to deny Appellant's rights as guaranteed by both the constitutions of the United States and the State of New York. The actions of the state and the actions of the Respondents are so inextricably intertwined such that the actions of the state would have been impossible without the actions of the Respondents. There could have been no arrest, imprisonment or prosecution of Appellant without the false statements by Respondents.

Colon, alone or in combination with the with the other law cited herein, provides the Court with the basis for renewing or re-opening the proceedings in McKoan, or in the interest of judicial economy, allowing the instant case to proceed.

b. Colon v. City of New York: Presumptions Of Probable Cause Overcome By Evidence Establishing That Witnesses Have Not Made A Complete And Full Statement Of Facts, Misrepresented or Falsified Evidence, Withheld Evidence Or Bad Faith

Colon contains a further point of law overlooked by the courts. Under Colon, any presumptions of probable cause are overcome by evidence establishing that witnesses have not made a complete and full statements of facts, that they misrepresented or falsified evidence, that they withheld evidence or otherwise acted in bad faith. Further, even a finding of probable cause in a misdemeanor proceeding is overcome where it is brought about by fraud, perjury, suppression of evidence or other witness conduct undertaken in bad faith (*See* Colon , 455, 456). The appellate court denied Appellant a full and fair hearing by overlooking the admissions against interest by Respondents that they had intentionally manufactured and broadcast the false statements about Appellant.

c. New York Jury Instructions: Unfavorable Termination Overcome By Evidence Establishing Fraud, Perjury, or Duress

Further, any unfavorable termination is overcome by evidence establishing fraud, perjury, or duress. Citing from Prepared Jury Instruction New York page 807 under probable cause:

> "...the prima facie case made by proof that plaintiff was held for the jury or indicted may in any event be overcome by proof that defendant presented false evidence or withheld pertinent exculpatory evidence which may have affected the decision of the magistrate or grand jury"

referencing Graham v. Buffalo General Laundries Corp., 261 N.Y.165, Hopkinson v. Lehigh Valley R.R. Co., 249 N.Y. 296, 164 N.E. 104, Lambert v. Cory, 23 A.D.2d 731, 258 N.Y.S.2d 413, Chernow v. Feldman, 251 A.D. 329, 296 N.Y.S. 149. And reading from the pattern charge:

"I charge you, therefore, that you must find that the defendant had probable cause to believe plaintiff guilty, unless you find that (holding, indictment, finding of guilt) was based upon evidence given by the defendant to the (magistrate, district attorney, grand jury, trial jury during the criminal trial) which was (false, incomplete) in material respect.... 'If you find that it was (falsified, withheld) your finding will be that the defendant did not have probable cause and you may, though you are not required to do so, infer from that fact that defendant acted maliciously.")

2. The Failure To Find Even A '*suggestion*' of Innocence Violates Appellant's Constitutional Rights

a. The '*suggestion*' Of Innocence Findings Violate Law and Common Sense

The appellate court and the trial court in McKoan ruled that Appellant failed to establish that the underlying misdemeanor proceeding contained even a *'suggestion'* of innocence -- the minimum required showing to maintain a malicious prosecution action under state law. There is no law establishing that the circumstances surrounding Appellant's case do not *'suggest'* his innocence. The misdemeanor court dismissed Appellant's case over the objections of the People and after denying the People's request for an adjournment to amend the complaint to satisfy any insufficiencies (this, according to Respondents). To even suggest that the actions of the court do not contain even the 'suggestion' of Appellant's innocence is to accuse the court of an obstruction of justice. As the decision of the appellate court in McKoan would have it, the misdemeanor court -- believing the Appellant guilty of a crime -- set the guilty party free by denying a proper and timely motion for an adjournment to amend the complaint by the People. If the

misdemeanor court did not recognize at least a 'suggestion' of innocence -- that is, the misdemeanor court believed the Appellant guilty of some crime whether or not the crime specifically charged -- the misdemeanor court would have allowed the People's motion to amend since there was no legal bar to the court's granting of such a motion. Law and common sense dictate that there was a *'suggestion'* of innocence under the circumstances of the case. Simple common sense tells you that a court would only set free a person whose innocence was at least *'suggested'* where it has no compulsion to do so under law as in the instant case. On the contrary, the court would do everything in its power to restrain a party it believed not to be innocent. In the instant case, there was no legal requirement to deny the People's motion to amend its complaint or to deny the People a chance to prosecute a person the court believed guilty of a crime. The denial of the People's motion and the setting free of the Appellant is a *'suggestion'* of innocence sufficient to satisfy existing state law. Denial of this by the courts was denial of Appellant's right to fair and equal treatment before the law, and due process.

Internal conflict and inconsistencies in decisions of the Court of Appeals, conflicts between decisions of the Court of Appeals, conflicts between decisions in the appellate divisions, and conflict with constitutional guarantee and legislated law require review of the malicious prosecution law contained in the instant complaint.

As to the law on the issue of the suggestion of innocence, the courts failed to recognize law contained in the Court of Appeals decisions in Halberstadt v. New York Life Ins. Co. 194 N.Y. 1, 86 N.E. 801 (1909) and Hollender v. Trump Village Coop, 58 N.Y.2d 420 (1983) upon which the Court of Appeals decisions in MacFawn v. Kresler, 88 N.Y.2d 859, 644 N.Y.S.2d 486 (1996), Ward v. Silverberg, 85 N.Y.2d 993, 629 N.Y.S.2d 168

(1995) rely. Further, the courts failed to apply the law of the case and chose, instead, to interpret MacFawn and Ward as per se denials of facial insufficiency as grounds for favorable termination for purposes of a malicious prosecution suit.

It is respectfully submitted that neither MacFawn nor Ward provide a basis, as a matter of law, to deny Appellant's claims for favorable termination. Both are firmly grounded in the law specifically applicable in their respective cases, and on a set of facts, and a record of proceedings, completely different from Appellant's case (*See* also Argument Point II (G)).

To bar a malicious prosecution suit based on Appellant's exercise of a right he is entitled to by the United States Constitution and the Constitution of the State of New York is a denial of due process as guaranteed by those constitutions (*See* also Argument Point II (G)).

Further, the courts' arguments for denial of Appellant's claims for favorable termination of his malicious prosecution suit clearly conflicts with the holdings in Schultz v. Greenwood Cemetery, 190 N.Y. 274, 83 N.E. 41 (1907), Chmielewski v. Smith, 73 A.D.2d 1053, 425 N.Y.S.2d 419 (1980), Campo v. Wolosin, 622 N.Y.S.2d 291 (1995) in addition to the Halberstadt and Hollender cases already cited (*See* also Argument Point II (G)).

G. The Unconstitutional Actions Of The Courts In McKoan

The decisions in McKoan violate Appellant's constitutional right (1) to due process, (2) to fair and equal treatment before the law and (3) his constitutional right to have triable issues arising from controverted facts and triable issues

arising from disputed inferences arising from uncontroverted facts decided by a jury of his peers. These constitutional violations occurred in the decisions by both the IAS court and the appellate court which in turn relied on unconstitutional law created by the Court of Appeals in its rulings in MacFawn and Ward (See MacFawn v. Kresler, 412 A.D.2d 925, 625 N.Y.S.2d 728 (3d Dept. 1995), aff'd 88 N.Y.2d 859, 644 N.Y.S.2d 486 (1996) and Ward v. Silverberg, 85 N.Y.2d 993, 629 N.Y.S. 168 (1995)). For the arguments below, the Court must set aside, vacate, reverse or otherwise nullify the unconstitutional law created in McKoan.

1. The New Common Law Malicious Prosecution Requirements Are Unconstitutional

a. The New Termination "on the merits" Standard

The IAS court and the appellate court denied Appellant a ruling of favorable termination finding that there was no termination "on the merits" as required by the Court of Appeals under the decisions in MacFawn and Ward. As argued below, these decisions were based on unconstitutional law.

The recent common law requirement for termination "on the merits" as stated in the Court of Appeals' decisions in MacFawn and Ward is in violation of the federal and state constitutional guarantees of due process and equal protection under the law as well as being inapposite with well established legal principles and in conflict with other decisions of the Court of Appeals and the trial and appellate courts. The issue here is first and foremost one of violation of federal and state constitutional law and secondarily a question of well established violation of federal and state legal principle and the holdings of the other state courts. This recent common law change denies the Appellant his due process right in the underlying misdemeanor proceeding to move to have allegations, either

frivolous or otherwise without basis in law or fact, dismissed without a trial on the merits. It abuses the Appellant, as well as the courts, jurists and taxpayers, by forcing an unnecessary judicial process and subjecting the Appellant to the unnecessary and punitive duress and financial burden of a trial if he is to meet the newly established criteria for favorable termination.

But even if a plaintiff resigns himself to accepting the state's unconstitutional denial of his due process rights, it would still be impossible for him to move for remedy. Under MacFawn and Ward it is impossible for a plaintiff against whom facially insufficient allegations or charges were brought in a misdemeanor complaint to get a trial on the merits since the trial court handling the misdemeanor complaint is under legal duty to dismiss such an action. A plaintiff could not prevent or refuse such an action by the court. Both the trial and appellate courts, under the constitution and laws of the State of New York, would be in violation of law and derelict in their duty if they granted such a request by Appellant since they merely pass along a decision that will be overturned by a higher court based on the law. With MacFawn and Ward the Court of Appeals has crafted unconstitutional law which denies due process to anyone confronted with frivolous or otherwise facially insufficient allegations and charges.

b. The New "proof of innocence at trial" Standard

With MacFawn and Ward the Court of Appeals, without explanation, radically changed existing law by requiring (1) a termination on the merits at trial and (2) proof of innocence at trial. Appellant now has the burden of proving his innocence at trial. Prior to MacFawn and Ward, the state high courts required a "suggestion of innocence" and "indication of innocence," and facial insufficiency was recognized by the courts as sufficient favorable termination for purposes of a malicious prosecution claim. This finding sets on its ear the

appellate ruling in Hankins v. Great Atlantic and Pacific Tea Co., 208 A.D.2d 111, 622 N.Y.S.2d 678 (1st Dept. 1995) (made before the rulings in MacFawn and Ward) in which the appellate court based on its own speculation, decided that the underlying criminal proceeding was dismissed because of Appellant's "uncontroverted alibi" (there had been no trial, and no findings of fact by a court or a jury, and no express reason for dismissal in the papers before the court). With MacFawn and Ward, the Court of Appeals has put on the Appellant a requirement that he abandon pre-trial remedies (dismissal for facial insufficiency) and seek acquittal after trial thereby compelling him to waive his state and federal constitutional rights to procedural due process.

c. The "suggestion of innocence" Standard Is Unconstitutionally Vague

No less unconstitutional is the state's original standard of a "suggestion of innocence" or "indication of innocence." While the standard appears meritorious at first glance, its application since its formulation by the Court of Appeals in Halberstadt in 1909 has shown it to establish no standard that can be fairly and equally applied by the courts. (Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 86 N.E.801 (1909)). Appellant emphasizes here that he is not claiming that the favorable termination requirement is unconstitutionally vague nor is plaintiff challenging the recognized standard that "allegations of fraud, perjury, conspiracy" remove the bar to bringing a malicious prosecution claim created by a finding of lack of favorable termination or probable cause. (See Colon v. City of New York, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453, 455 (1983)). The argument is that "suggestions" or "indications" of innocence is too vague a standard. The conflicts in the small number of reported cases (which, for the most part, leave hidden from view and review the vast body of trial court decisions which are not published) bear out the inability of the courts to apply this standard with any consistency making the

legal protections available to a litigant dependent not upon the law but upon the litigant's financial ability to bear the cost of counsel to litigate (1) in the trial court, then (2) the appellate court, then (3) the Court of Appeals, and then (4) the Supreme Court of the United States.

The impossibility of applying with certainty such a vague and self contracting standard (or standards depending on which citations one relies on) is evident in McKoan. Respondents' lawyers' assertions that circumstances surrounding Appellant's dismissal do not contain a "suggestion of innocence" or an "indication of innocence" is for Respondents', the IAS court and the appellate court to accuse the misdemeanor court of gross dereliction of duty and violation of law. In McKoan, Appellant argued that the misdemeanor courts' refusal to allow the prosecution to adjourn the proceeding was sufficient suggestion or indication of innocence to support a malicious prosecution claim. Respondents argued that the prosecution asked for an adjournment to "amend their complaint." Given Respondents' own arguments, any reading of the misdemeanor court's decision to deny an adjournment other than that the court did not believe the Appellant guilty of any offense or violation, would amount to a direct accusation leveled by Respondents of gross dereliction of duty by the court and a violation of law: the court was freeing a person it believed guilty of a crime by (1) failing to amend the complaint on its own initiative and within the limits of its authority, and (2) by denying the prosecution its capability to amend the complaint in respect to those areas beyond the misdemeanor court's authority. Appellant also argued, and argues here, that, under the totality of the circumstances surrounding of Appellant's misdemeanor proceeding, including the prosecutors repeated failures to be prepared to proceed, his refusal to amend his complaint in response to Appellant's motion to dismiss, his failure to appeal the decision of the misdemeanor court, his failure to re-file charges and his failure to file any other charge before or after the dismissal are indication that the Appellant

was innocent of the allegations sufficient to satisfy the suggestion of innocence/indication of innocence standard.

d. Denial of the "presumption of truth" Is Unconstitutional

The courts may not act prejudicial and must apply law and constitutional guarantees equally. However, in McKoan and in the misdemeanor proceeding underlying McKoan, rights afforded to Respondents and the prosecution are denied to the Appellant. While the allegations of the Respondents were given the presumption of truth by the offices of the New York County District Attorney and the state judiciary (misdemeanor court) prior to any submission of proof or evidence to the triers of fact (jury), the facts alleged by Appellant are denied the same presumption of truth (i.e.., admissions against interest by Respondents). Appellant is thereby denied his federal and state constitutional guarantees of due process and fair and equal treatment before the law by the courts.

e. The Finding of "probable cause": Constitutional Violation and Obvious Error by the Appellate Court

The appellate court violated Appellant's state and federal constitutional rights to have triable issues of disputed fact and issues of disputed inferences drawn from undisputed facts determined by a jury of his peers and committed obvious error in ruling that Respondents had probable cause to make false statements for the purpose of instigating a prosecution of the Appellant. Probable cause consists of such facts and circumstances to believe Appellant guilty (See Colon). In addressing probable cause, the appellate court stated in its ruling:

> "The malicious prosecution causes of action were also properly dismissed since the reasonableness of, and therefore probable cause for, defendants' decision to report plaintiff's conduct to the District Attorney was amply supported by documentary evidence from plaintiff's criminal case, including plaintiff's admissions with respect to his alleged threatening statements and behavior, the discovery of weapons[61] in one of plaintiff's homes and court order directing plaintiff to undergo psychiatric treatment and to stay away from Kidder Peabody employees."

The IAS court did not make a finding of probable cause.

The facts and alleged facts noted by the appellate court in its decision do not form a basis for a finding of probable cause for the Respondents to act as they did. The alleged discovery of weapons in one of his homes, and the court orders directing Appellant to undergo psychiatric treatment and to stay away from Kidder Peabody employees occurred <u>after</u> LaFergola and McKoan made their statements to the New York County District Attorney's investigator and therefore could not have influenced them. That leaves only ". . . plaintiff's admissions with respect to his alleged threatening statements and behavior . . ." upon which the this Court could base its finding. Whether or not the statements (1) were made (other than the one remark by plaintiff discussed herein), and (2) whether or not they were intended to convey a threat (3) whether or not they constituted threats (4) whether or not they were perceived as threats, <u>are all controverted facts and triable issues for a jury to decide and not for the courts to decide</u>.

As to the one remark made by Appellant, <u>the inferences drawn from it are controverted and as such a triable issue of fact for a jury</u>. Respondents have never denied this nor have

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[61]There was no weapons offense charged against Appellant.

Respondents ever denied that these words do not establish as a matter of law (which is the only constitutionally authorized basis upon which the courts could make such a finding) that they were threatening, (2) there is no allegation in the McKoan complaint or the underlying misdemeanor proceeding that McKoan, or for that matter Liftin or anyone else, perceived these specific words or Appellant's "pointing" of his finger as a threat, or any allegation that these specific words or Appellant's "pointing" of his finger were a threat. All of these issues are controverted inferences arising from undisputed facts and therefore triable issues by jury and not the court. Respondents do not deny this.

The appellate court cited Colon as supporting its ability to decide as a matter law triable issues of fact. This is obvious error and contrary to the principle of law established in Colon. Colon holds that any presumptions of probable cause are overcome by evidence establishing that witnesses have not made a complete and full statements of facts, that they misrepresented or falsified evidence, that they withheld evidence or otherwise acted in bad faith. (See Colon 455, 456). LaFergola had confessed to the fabrication of the allegations against the Appellant and the application of influence within the New York County District Attorney's office to affect a baseless prosecution of Appellant and made this confession before witnesses. Respondents have never denied this. Until this issue and the issue of the truthfulness of the statements by LaFergola and McKoan are resolved there can be no finding, as a matter of law, that there was probable cause or lack of favorable termination.

Further, a determination on whether the Respondents acted with probable cause is a separate question from whether or not the New York County District Attorney acted with probable cause and it is respectfully submitted that the appellate court in McKoan confused the basis upon which a determination of probable cause for the actions of the People

with the basis for the determination of probable cause for the actions of the Respondents. The question of whether a prudent man in the same circumstance would have acted as the Respondents acted requires first and foremost a determination of what the facts and circumstances are. If those facts and circumstances, and any reasonable inferences that may be drawn therefrom, are in dispute, then it is a jury question and not a question that may be decided by the courts. In McKoan, the truthfulness of the statements of LaFergola and McKoan is challenged by Appellant and whether or not the statements by LaFergola and McKoan are truthful has not - and cannot - be determined as a matter of law by the courts. Respondents do not deny this. **f.**

f. Denial of "innocent until proven guilty" Is Unconstitutional

Under the federal and state constitutions, under statute and common law, a person in presumed innocent until proven guilty. Not so under McKoan, MacFawn, and Ward. Under the common law established in said rulings, a plaintiff is presumed guilty of the underlying misdemeanor complaint and not innocent as required by constitution, statute and common law. Further, under McKoan, a person can be found guilty (without trial) of a misdemeanor based on events that had not even occurred at the time of the alleged misdemeanor and were unknown to the persons instigating the misdemeanor complaint. Citing from Respondents in McKoan (R.716 par. 52):

> "Moreover, Appellant's agreement to a Protection Order and psychiatric treatment (R.515-17), and his affirmation that he would not possess guns or cross-bows (R.497), were evidence of the threats made and Appellant's ability to carry them out."

Evidence that "threats" were made? Nonsense. Appellant never made any threats and no court has ever found that he did.

Appellant here was simply respectful of the misdemeanor court and cooperative with the People.

2. Intentional Infliction Of Emotional Distress: Violation Of Constitutional Rights By The IAS Court And The Appellate Court

As to the intentional infliction of emotional distress claim, the IAS court and the appellate court violated Appellant's constitutional rights of due process, fair and equal protection, and the right to have triable issues of controverted fact, and triable issues arising from disputed inferences arising from uncontroverted facts, decided by a jury of Appellant's peers. Respondents do not deny that these rights were denied Appellant. The denials here are first and foremost questions of denial of constitutional rights and secondarily involve conflicts with well established principles of law and conflicts in the holdings of the courts. In McKoan the courts failed to recognize case law supporting Appellant's claim and failed to recognize the facts in the proceedings.

As its tort standard for intentional infliction of emotional distress, the IAS court relied on the Restatement of Torts, Second, as quoted by the Court of Appeals, in Murphy v. America Home Products Corp., 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232 (1983):

> "plaintiff must allege conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"

The appellate court cites the same standard based on the Court of Appeals decision in Howell v. New York Post Co., 81 N.Y.2d 115, 121-122, 596 N.Y.S.2d 350 (1993).

It is impossible for the IAS court or the appellate court, as a matter of law, to determine whether or not such a standard had been met in McKoan since the crucial element in the complaint -- whether or not Respondents made false statements to the New York County District Attorney's Office -- had not been determined by a jury and could not be determined as a matter of law by the IAS court or the appellate court, the courts being prohibited by law and constitution from deciding triable issues of controverted fact or disputed inferences arising from uncontroverted facts. The IAS court and this Court here exceeded their statutory and constitutional authority. Respondents do not deny that this determination is critical, that no such determination was made by a jury, or that this determination could not be made as a matter of law by the courts.

It is further argued there is no parallel between the conduct alleged by the Appellant in the proceedings in McKoan and the conduct alleged in Howell or Murphy. The courts failed to recognize the appropriate standard as set forth in Levine v. Gurney, 149 A.D.2d 473, 539 N.Y.S.2d 967 (1989) (upon which alone the Appellant's claim for emotional distress should have been granted), Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647, (1970), Galella v. Onassis, 353 F.S. 196 (1972), Galella v Onassis, 487 F.2d 986 (1973), Galella v. Onassis, 533 F.S. 1976 (1982), and Long v. Beneficial Fin. Co. of N.Y., 39 A.D.2d 11, 330 N.Y.S.2d 664 (1972).

3. Other Constitutional Violations And Errors In McKoan By The IAS Court

a. Search Warrant

The IAS court alleged the existence of search warrant but stated no basis for its determination (R.669, par. 3). The appellate court made no such finding. Appellant denied the existence of a search warrant and no search warrant was

included among the papers before the IAS court, nor was a search warrant ever produced in the misdemeanor proceeding, and no search warrant was ever shown to Appellant or Appellant's counsel. The existence of search warrants is a controverted fact. That "The Supreme Court [IAS court] found, based upon documentary evidence" - as Respondents allege -, that a "search warrant was issued and a search of (Appellant's) apartment uncovered a number of weapons" is patently false. There is no documentary evidence, much less uncontroverted documentary evidence, in the record of any search warrant (or warrants) (R.565, par. 19). The existence of search warrants is a triable issue of fact for a jury to decide. The determination by the IAS court denied Appellant's rights to due process and fair and equal treatment as provided by federal and state constitutions. Further, no "weapon" or "weapons" were found in Appellant's Manhattan apartment, which at the time of the illegal search was occupied, not by Appellant, but by friends and former clients of Appellant. No weapons charge was filed against Appellant.

b. Discovery Denied

Access to critical information in the sole control of Respondents, notably the admissions against interest by LaFergola and McKoan, was denied to the Appellant by the IAS court. Included in the information was the April 28, 1995 confession of LaFergola. At a minimum, LaFergola's admissions would have allowed Appellant to move for summary judgment on both his claims having established fraud and false witness as the basis of his tort claim for malicious prosecution as provided under Colon and tort claim for intentional infliction of emotional distress as provided under Nader, Onassis, and Levine. Here again the IAS court denied Appellant due process and fair and equal treatment before the law.

c. Summary Judgment

The IAS court converted Respondents' pre-answer motion under CPLR 3211 (a) (1) and (7) to a motion for

summary judgment under CPLR 3211 (c) and 3212 without giving notice to the parties. Here, the nomenclature that the IAS court used was not determinative of the legal procedure that was followed. Without having been given notice, Appellant was denied the opportunity to gather necessary materials to oppose such a motion. As argued in the previous paragraph, Appellant could have successfully opposed such a motion through depositions permitted under CPLR 3211 (d) and 3212 (f). Appellant was prohibited from getting necessary evidence substantiating his claims and otherwise satisfying the IAS court's objection that Appellant had failed to plead facts but rather had plead only "conclusory and unsubstantiated allegations" (R.668). The IAS court here denies Appellant due process and fair and equal treatment before the law.

4. Constitutional And Statutory Rights Violations Requiring Review By Court Of Appeals

As argued earlier, the holdings in McKoan, MacFawn, and Ward are firstly unconstitutional and secondly bad law. Under New York law, Appellant had the right to have these constitutional challenges reviewed by the Court of Appeals. The Court of Appeals is under obligation to hear Appellant's claims given the substantial issues of justice involved, the direct constitutional issues involved, case law conflict, conflicts between decisions of the Court of Appeals, the public importance of the issues, and the unprecedented nature of the issues. Appellant directs the Court to his constitutional arguments in the previous paragraphs and presents below arguments based on the statutory obligations of the Court of Appeals. The Court of Appeals' obligation in McKoan is first and foremost to resolve the constitutional challenges therein, and secondarily answer the conflict problems defined below. Review here is necessary given the holdings of the courts below that the facts in General Electric and the facts in McKoan are the "same facts".

a. The Tort Claim for Malicious Prosecution

The precedents upon which the IAS court and the appellate court relied to deny Appellant's claim for malicious prosecution conflict with earlier decisions of the Court of Appeals and the appellate and trial courts, contain internal contradictions, and are inapposite to their decision (See the courts' citation of MacFawn and Ward as supporting the courts' finding that the Appellant failed to satisfy the favorable termination element of this cause of action; See the appellate courts' citation of Colon as supporting the court's claim of probable cause).

Conflicting and contradicting the holdings in MacFawn and Ward above are Halberstadt (dismissal as of right where dismissal in some manner involves the merits and not based on compromise is sufficient favorable termination for malicious prosecution claim) Hollender v. Trump Village Coop., 58 N.Y.2d 420 (1983) (compromise precludes favorable termination [ACOD, ACD]), Schultz v. Greenwood Cemetery, 190 N.Y. 276, 83 N.E. 41 (1907) (facial insufficiency sufficient favorable termination for malicious prosecution), Chmielewski v. Smith, 73 A.D.2d 1053, 425 N.Y.S.2d 419 (1980) (facial insufficiency sufficient favorable termination for malicious prosecution), Campo v. Wolosin, 622 N.Y.S.2d 291 (1995) (plaintiff could maintain malicious prosecution action despite contention that criminal charges were not dismissed on the merits where Respondents complaints had lost interest in the prosecution so that dismissal was indicative of plaintiff's innocence of charge). See also Melito v. City of Utica, 620 N.Y.S.2d 648; Reit v. Meyer, 169 A.D.2d 752, 146 N.Y.S.2d 75 (dismissal for lack of speedy trial sufficient termination for malicious prosecution action); Gastman v. Meyer, 285 A.D.2d 611, 139 N.Y.S.2d 602 (same).

The Court of Appeals' decisions in MacFawn and Ward, rather than clarifying the termination element necessary for a malicious prosecution action, created even greater confusion. Halberstadt, as well as all the citations in the previous

paragraph, support facial insufficiency under the circumstances surrounding the dismissal of the Appellant's misdemeanor prosecution as a sufficient basis for a malicious prosecution action.

The Court of Appeals has the obligation to remove the confusion it had introduced into the body of law and clarify its rulings in MacFawn and Ward as regard favorable termination as they depart from accepted precedent and in particular Halberstadt upon which both claim to rely. Specifically, the Court needs to (1) define 'merits' for the purposes of maintaining a malicious prosecution suit, (2) the degree to which these merits need to be 'involved,' and (3) what constitutes a 'sufficient' degree of indication of guilt or innocence. The Court of Appeals needs to clarify whether it holds Halberstadt to be good law, or if it reverses the holdings in Halberstadt, as well as the Restatement of Torts, Second, and the precedents cited above, and now makes a radical shift from accepted precedent and narrowly defines the only basis upon which a malicious prosecution action may be commenced is after a finding of 'innocence after trial' which is the interpretation that the IAS court and the appellate court applied to the Appellant to deny his claim for sufficiently favorable termination in McKoan.

Further, the Court of Appeals has an obligation to clarify the nature and weight of the inferences that can be drawn from a refusal of a criminal court justice to allow any further adjournments to a prosecutor to whom he had already allowed several adjournments, to a prosecutor who, after being presented with a motion to dismiss over 10 months earlier for facial insufficiency, refuses to amend his complaint in response to this motion and staunchly argues the sufficiency of his complaint, and who then fails to appeal the court's granting of the motion to dismiss or to file new charges.

Further, the reliance of the IAS court and the appellate court on MacFawn and Ward to deny a sufficiently favorable

termination is in conflict with the instructions to the jury on favorable termination in the Prepared Jury Instruction New York at page 802 which directs the jury to disregard a finding of unfavorable termination if such termination is brought about by fraud, perjury, or duress and directs the court's attention to apply the same rule for overturning a ruling of probable cause as that for overturning a finding of unfavorable termination. (See Colon; See Prepared Jury Instruction New York under favorable termination p. 802 citing Johnson v. Gridwood, 7 Misc. 651, 28 N.Y.S. 151, aff'd 143 N.Y. 660, 39 N.E. 21; Robbins v. Robbins, 133 N.Y. 597, 30 N.E. 977, Simmons v. Sowers, 253 A.D. 819, 1 N.Y.S.2d 339, aff'd 282 N.Y. 651, 26 N.E. 801, Caminito v. City of New York, 25 A.D.2d 848, 269 N.Y.S.2d 826, aff'd 19 N.Y.2d 931, 281 N.Y.S.2d 338, 228 N.E. 396; Goldner-Siegel Corp v. Kraemer Hosiery Co., 153 Misc. 159, 274 N.Y.S. 681; See also annotation 89 A.L.R.2d 1090 at 1113, and Restatement, Torts 667; Annot:59 A.L.R.2d 1413; See Prepared Jury Instruction New York page 807 under probable cause:

> "...the prima facie case made by proof that plaintiff was held for the jury or indicted may in any event be overcome by proof that defendant presented false evidence or withheld pertinent exculpatory evidence which may have affected the decision of the magistrate or grand jury"

referencing Graham v. Buffalo General Laundries Corp., 261 N.Y.165, Hopkinson v. Lehigh Valley R.R. Co., 249 N.Y. 296, 164 N.E. 104, Lambert v. Cory, 23 A.D.2d 731, 258 N.Y.S.2d 413, Chernow v. Feldman, 251 A.D. 329, 296 N.Y.S. 149. And reading from the pattern charge:

> "I charge you, therefore, that you must find that the defendant had probable cause to believe plaintiff guilty, unless you find that (holding, indictment, finding of guilt) was based upon evidence given by the defendant

to the (magistrate, district attorney, grand jury, trial jury during the criminal trial) which was (false, incomplete) in material respect.... If you find that it was (falsified, withheld) your finding will be that the defendant did not have probable cause and you may, though you are not required to do so, infer from that fact that defendant acted maliciously."

Respondents have never denied these contradictions.

The appellate court relied on the Court of Appeals ruling in Colon to find that the Respondents had probable cause for their actions. The IAS court made no such finding. Colon, rather than support the court's finding, contradicts the decision of the court and is in conflict with and inapposite to it as discussed in the previous paragraph. It also poses to the Court of Appeals the unresolved question of whether or not facts not known to the Respondents can be basis for their actions. Simply put, knowledge not in possession of the Respondents could not possibly have influenced their judgment.

Further, LaFergola and McKoan made admissions that the statements they made to the New York County District Attorney's Office were false. LaFergola having explicitly admitted before witnesses that the statements he made were false, that Cerullo forced him to make these false statements, that he (LaFergola) repeatedly denied that there was anything threatening in the conversation between himself and the Appellant on November 30, 1993 and that Cerullo assured LaFergola not to be concerned since the Respondents had influence in the New York County District Attorney's Office that assured the success of their scheme. Respondents have never denied these admissions.

b. The Tort Claim for Intentional Infliction of Emotional Distress

The decisions of the IAS court and the appellate court

denying Appellant's claim for intentional infliction of emotional distress is in conflict with the appellate court [Second Department] decision in Levine (specter of imprisonment sufficient to sustain a cause of action for emotional distress), the Second District's ruling in Galella v. Onassis, 353 F.S. 196 (1972), Galella v. Onassis, 487 F.2d 986 (1973), Galella v. Onassis, 533 F.S. 1076 (1982) (overzealous surveillance and campaign of harassment sufficient to sustain emotional distress claim), and the findings of the Court of Appeals and lower courts in Nader (campaign of harassment sufficient to sustain an emotional distress claim), and Long. Further, the findings in Nader have been codified as a basis for intentional infliction of emotional distress in the Prepared Jury Instructions of New York. Further, the state courts have never had before them a confluence of acts constituting a claim for intentional infliction of emotional distress as are presented by the Appellant's case. The IAS court and the appellate court relied solely on Howell to sustain their decision. The facts in Howell are completely different from those in Appellant's case; Howell deals with one act of publication of the plaintiff's picture and said act considered protected conduct under the First Amendment whereas, Appellant's case alleges a campaign of harassment protracted over time and including as one element the ability of one of the most powerful and politically well connected corporations in the world to use the state to perform illegal acts on its behalf.

c. Unintentional State Sanctioned Fraud

With MacFawn and Ward the Court of Appeals has unintentionally set up a mechanism for criminal and other persons and entities, especially those expert and knowledgeable in the ways of manipulating the law and influencing the legal process, to use the state, the police, the district attorney, and the courts to perform illicit, illegal and unconstitutional acts for them under the color of law and the authority of offices of these state actors. By using state actors as their servants, Respondents apparently guarantee themselves freedom from

any recourse or remedy against them for their illicit acts. By giving Respondents the presumption of truth in allegations in misdemeanor proceeding and denying Appellant the same presumption in his allegations, the courts have made it impossible for an individual against whom false witness is brought by Respondents to seek remedy under malicious prosecution or emotional distress. The Court must rule to deny such an avenue to Respondents.

Argument Point III.
COMPLAINT PERMITTED UNDER LEGISLATED LAW
Denial of Due Process
Landmark Case Of First Impression

For the Arguments here, Appellant directs the Court to his arguments under Argument Point I (A) (2): Legislated Law vs. Court Created Precept: CPLR 205 (a) v. Res Judicata.

Argument Point IV.
SERVICE AND FILING
Denial of Due Process

A. LaFergola Motion

1. Granting the LaFergola Motion Was Denial Of Due Process

The IAS court granted the LaFergola Motion on default. The courts erred in not recognizing law, case law, the reasonableness of Appellant's excuse, and the merit in Appellant's General Electric complaint.

According to the affidavit of process server Torres, service was made on LaFergola in accordance with CPLR 308 (2) (R.944).

LaFergola claims never to have been served within the requirements of CPLR 308 (2) and denied the IAS court's jurisdiction over him (R.902). According to Respondents, Torres' affidavit of service could not be located in the Clerk's file. The Clerk has never responded to Appellant's inquiries about this alleged disappearance (R.475-477). Respondents attorneys' were aware that the papers had been filed but withheld this evidence from Appellant and the IAS court. (*See* Facts And Procedural History).

Issues of fact exist surrounding service on LaFergola. A hearing is required under law to determine disputed facts regarding service and the filing of proof of service. The legal requirement of such hearing precludes dismissal of the action against LaFergola. The courts denied Appellant's right to due process and fair and equal treatment before the law by failing to conduct or to order such a hearing.

> (See Lancaster v. Kindor, 98 A.D.2d 300, 471 N.Y.S.2d 573, affirmed 65 N.Y.2d 804, 493 N.Y.S.2d 127, 482 N.E.2d 923 (1984) even though plaintiff, who did not make a timely filing of proof of service, did not make a motion for a nunc pro tunc filing of proof of service, filing would be deemed to have been timely, in light of fact plaintiff was a pro se litigant, and thus could be granted procedural liberties not generally afforded attorneys representing clients at bar. [emphasis added])

> (See Green Point Sav. Bank v. Taylor, 92 A.D.2d 910, 460 N.Y.S.2d 121 (1983) sworn denial by defendant that she had been served required hearing to determine whether she was in fact served; Made-Ready Door Co., Div. of Timbercraft, Inc. v. Fox Ledge Corp., 86 Misc.2d 518, 382 N.Y.S.2d 682 (1976) where plaintiff's assertion that a copy of summons and complaint was delivered to managing agent of corporate defendant within jurisdictional limits of court was disputed by

defendant's assertion that service was never made upon its managing agent, issue of fact concerning service of process was raised requiring a hearing and precluding dismissal of action; Gintzler v. Schwartz, 126 Misc.2d, 482 N.Y.S.2d 986, on reargument 129 Misc.2d 836, 494 N.Y.S.2d 649 (1984) hearing was required to determine whether process server mailed summons to defendant's last known residence in light of defendant's affidavit that he never received a mailed copy and affidavit of process server attesting to the mailing; Wiley v. Lipset, 140 A.D.2d 336, 527 N.Y.S.2d 829 (1988) defendant's sworn denials with respect to claims that plaintiff did not use due diligence before making alleged substituted service of process and that plaintiff's process server failed to affix copy of summons with notice to door of defendant's residence required that matter be remitted for hearing on defendant's motion top dismiss complaint for lack of personal jurisdiction; Frankel v. Schilling, 149 A.D.2d 657, 540 N.Y.S.2d 469 (1989) defendant's assertion that no summons was served upon him personally or mailed to his address, and that person identified as his wife in process server's affidavit of service never received process entitled defendant to hearing on issue of whether service was properly made.)

Respondent does not deny that issues of fact exist surrounding service and Respondent does not deny that under law a hearing to determine said disputed facts is required.

In opposition to the LaFergola Motion to dismiss, Appellant provided the IAS court (R.851-873) proof that good service had been made on Lafergola, an affidavit of service was filed with the court and Appellant moved for orders of the IAS court nunc pro tunc: (1) under CPLR 306 (a) (b) (d) and 306-b (a) (b) recognizing the filing of the affidavit of service; and (2) authorizing service in accordance with CPLR 308 (5) owing to: (1) Respondent's efforts to thwart service and to conceal his

location so as to frustrate service; (2) Appellant's lack of knowledge of, and inability after investigation to determine LaFergola's place of business, dwelling place or usual place of abode; and (3) LaFergola's efforts to harass and abuse Appellant by subjecting Appellant to the unnecessary and burdensome expense of re-attempting service and to defend against the LaFergola Motion (R.948 for CPLR 306, R950 for CPLR 306-b, R952 for CPLR 308). It was contrary to law previously cited for the courts to deny Appellant the relief he requested.

Further, the LaFergola Motion and the proceedings and judicial resources related to his motion were necessary only due to LaFergola's refusal to admit personal service or to accept service upon his attorneys, Miller & Wrubel, P.C., who at the time of LaFergola's refusal, appeared or intended to appear for all the named Respondents: General Electric, Kidder Group, Kidder, Cerullo, McKoan and LaFergola. Respondent and Respondent's attorneys did not deny in the court below that General Electric - who is paying Mr. LaFergola's legal expenses in this action - intended Miller to appear for LaFergola in this action (R.933 through 943). Further Miller has appeared for LaFergola and all the other named Respondents - except Cerullo - in McKoan.

According to evidence submitted at trial, Mr. Miller (attorney for Respondents [Miller & Wrubel]) initiated calls to Mr. LaFergola commencing on 12/30/96 to determine if service had been made on him (LaFergola) (R.1275). Attorneys from Mr. Miller's firm spoke with LaFergola and all the other named Respondents before his firm advised Appellant that LaFergola had not authorized then to appear for him and they would not accept service.

In the interest of judicial economy, Appellant submitted a separate application to LaFergola requesting that he withdraw his motion and acknowledge service of the summons and

complaint in accordance with CPLR 306 (e) (R.947 and 948 for CPLR 306). Appellant argued that such a move would be in the interest of justice and make unnecessary substantial court, counsel, and party time and expense. LaFergola would have suffered no prejudice since he is already joined in his attorneys' second motion to dismiss the complaint on behalf of General Electric, Kidder Group, Kidder, Cerullo, McKoan and LaFergola (R.540-602). LaFergola refused this request.

Appellant moved for the IAS court under CPLR 308 (5) to recognize existing service or to permit Appellant to make service in such manner as the Court directs, since service was impracticable under paragraphs one, two, and four of section 308 of the CPLR, Appellant not knowing LaFergola's place of business, dwelling place or usual place of abode and LaFergola having taken action to thwart service and to conceal his location to frustrate service. (R.866- 870).

> (See Liebeskind v. Liebeskind, 86 A.D.2d 207, 449 N.Y.S.2d 226, affirmed 58 N.Y. 2d 858, 460 N.Y.S.2d 526, 47 N.E. 2d 74 (1982), to warrant expedient service on ground that other methods of service are "impracticable," a plaintiff is not required to demonstrate that prior attempts at service were undertaken but only that such other means of service were impracticable and plaintiff is not required to demonstrate due diligence before seeking substitute service on ground of impracticality; See, also, Coyne v. Coyne, 83 A.D.2d 774, 443 N.Y.S.2d 472 (1981); Dashew v. Cantor, 85 A.D.2d 619, 445 N.Y.S. 2d 24 (1981), in view of evidence of Defendant's attempt to evade service, trial court properly granted leave to make special service; Tremont Fed. Sav. and Loan Ass'n v. Ndanusa, 144 A.D. 2d 660, 535 N.Y.S.2d 8 (1988), for court to issue an order of publication of service on the ground that service is "impracticable" under the other statutory methods, applicant is not required to prove

due diligence, which is the higher standard impracticable, nor show actual prior attempts to serve a party under each and every method provided in the same statute; See also 53rd & 7th Corp v. Rossi, 85 Misc.2d 916, 381 N.Y.S.2d 372 (1975); L-C Sec. Service Corp v. State, 107 Misc.2d 433, 434 N.Y.S.2d 883 (1980), personal service upon a natural person may be made in such manner as court, upon motion without notice, directs, if service is impracticable under other methods intended to permit any service within limits of due process; Zeek v. Zeek, 74 Misc.2d 758, 346 N.Y.S.2d 117 (1973), service may be made in such manner as court, on motion without notice, directs, if service is impracticable under such procedures, is to give court discretion to permit special modes of service where there is not other mode of service available; See also Van Dunk v. Lazrovitch, 50 Misc.2d 649, 270 N.Y.S.2d 803 (1966); see also Nesi v. Heimann, 178 Misc. 195, 33 N.Y.S.2d 559 (1942), proof of inability with the exercise of due diligence to serve the Defendant within the state is all that is required to warrant order authorizing substituted service of summons on a resident Defendant; 53rd 7th Corp. v. Rossi, 85 Misc.2d 916, 381 N.Y.S.2d 372 (1975), service of process in such manner as is adopted by court, upon motion without notice, intended for use in unpredictable circumstances where more flexible or appropriate manner of service; provision enables the court to tailor method of service to particular facts of the case before it; See Totero v. The World Telegram Corp., 41 Misc.2d 594, 245 N.Y.S.2d 870 (1963), an attempted service which does not comply with CPLR 308 (1)(2) or (4) may be salvaged by a nunc pro tunc order entered under 308 (5). In Totero service was attempted on a non-domiciliary who had transacted business in New York by leaving the summons with a person who had acted as

agent for the Defendant in other matters, but not in connection with the transaction involved in the lawsuit. Concluding that service in the customary fashion was impracticable, the court, by ex parte order under CPLR 308 (5), validated the service on the Defendants' agent. Since the mode of service selected by the Plaintiff was reasonably calculated to apprise the Defendant of the action, and since all other avenues had been exhausted unsuccessfully, service was properly sustained under CPLR 308 (5).

The IAS court acted contrary to law cited in failing to grant this relief to Appellant.

Appellant moved the courts for an order sustaining or otherwise authorizing service under CPLR 308 (5) under one or more of the following alternatives available to the courts:

(1) sustain existing service on LaFergola at Kross, LaFergola having admitted to having received a true copy of the summons and complaint (R527 at par. 4);

(2) that service of the summons and complaint as on LaFergola is to be made upon:

(a) attorney of record, Miller & Wrubel and/or

(b) by mailing the summons and complaint to LaFergola at his last known residence at 47 Bramble Lane, Matawan (Old Bridge), New Jersey 07747 and/or

(c) by mailing the summons and complaint to his last known place of business at Kross.

(3) sustain service made upon LaFergola at 55 West End Avenue, apt 11F, New York, New York, 10023 on

August 14, 1997, which, on information and belief, is LaFergola's current dwelling place (R946).

(4) service of the summons and complaint on LaFergola is to be made in accordance with CPLR 312-a [personal service by mail]; CPLR 316 [service by publication]; or CPLR 318 [designated agent for service] (R.954 for CPLR 312-a, R.959 for CPLR 316, R.960 for CPLR 318; see also R.958 for CPLR 315, service by publication authorized).

(5) service to be made in other manner as determined by the courts such that LaFergola will be given reasonable form of notice in light of all the circumstances of the case, all the interests involved and the due process requirement that notice be reasonably calculated to appraise the LaFergola of the action.

The courts failed to provide the relief requested as required under the law previously cited.

Appellant had no knowledge of LaFergola's residence or work addresses at the onset of this suit. Appellant attempted service upon LaFergola by requesting permission to make service upon Miller & Wrubel, the lawyers selected, paid and intended by Respondent General Electric to appear for all the Respondents listed by name in the caption and who now do appear for all said Respondents. (R.933 through 943; R.540 through 602; R.904 through 929). The purpose of this refusal was to thwart service upon LaFergola. This effort to thwart service was combined with LaFergola's other efforts to frustrate service by concealing his employment at Kross in December when he instructed employees of Kross to give out false information that he was not working there. Such information was given to Mottley on or about December 23, 1996 when he attempted service. After Mottley attempted service LaFergola accepted calls at Kross and represented himself as an employee

of Kross. Kross continued to accept phone calls for LaFergola, never denied that LaFergola was an employee at Kross, and on instructions from LaFergola screened LaFergola's calls, requesting callers to identify themselves and the purpose of their calls before transferring them to LaFergola. In another act to thwart service and to continue to conceal his location, LaFergola - while having refused to accept service on his attorneys and admitting to having received a true copy of the summons and complaint and joining in Respondents' second motion to dismiss (April Motion) - refused to admit service under CPLR 306 (e) and instead subjected the Appellant to the unnecessary burden and expense of defending against his motion to dismiss for lack of jurisdiction.

2. Denial Of Reasonableness Of Appellant's Default Excuse On Lafergola Motion Was Denial Of Fair And Equal Treatment Before The Law

Appellant explained the reason for this default on the LaFergola Motion that he had become so involved in responding to Respondents' April Motion that he failed to prepare a response to the LaFergola Motion. Appellant intended to answer the motion and the IAS court recognized his intention noting Appellant's request of Respondents that the reply to the April Motion and the LaFergola Motion be due on the same date (R.17-19). And Appellant presented the IAS court with that reply in the form of his supplement to his 2 orders to show cause (R.851) opposing dismissal and basing that opposition on legislated law and precedent. The IAS court acted contrary to said law and precedent by denying the reasonableness of the pro se litigant's (Appellant's) excuse. Appellant clearly intended to oppose the motion and file opposition and did, in fact, file opposition (R.851) which was based on law and precedent and the merit of the underlying complaint. Appellant's failure was procedural in nature, and just as the court found in Lancaster v. Kindor Appellant should have

been granted permission to file his opposition. And such is in accord with policy in the courts regarding just and fair treatment and affording consideration to pro se litigants not normally extended to attorneys at bar.

Neither the Respondents nor the courts cite any law where a pro se Appellant is denied relief based on the circumstances of the instant case. Respondents cite no case where the courts have denied a pro se Appellant for the excuse given by Appellant. Nor do Respondents deny that the standards applied to pro se litigants are subject to liberties not normally allowed attorneys at bar (*See* Lancastor vs. Kindor, 98 A.D.2d 300, 471 N.Y.S.2d 573, affirmed 65 N.Y.S.2d 804, 493 N.Y.S.2d 127, 482 N.E.2d 923 (1984)). Respondents do not rebut that the denial of Appellant's excuse for default is denial of fair and equal treatment before the law and denial of due process.

Respondents do not deny that the relief requested by Appellant is available under the legislated law cited below or that the actions of the courts in denying relief are in conflict with said laws (CPLR 103, 104, 2101, 2001, 2002, 2004, 2005, Rule 201(b) of the Uniform Civil Rules for the Supreme and County Courts):

> CPLR 103. Form of civil judicial proceedings. (c) Improper form. If a court has obtained jurisdiction over the parties, a civil proceeding shall not be dismissed solely because it is not brought in proper form, but the court shall make whatever order is required for its proper prosecution.
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> CPLR 104. Construction. The civil practice law and rules shall be liberally construed to secure just, speedy and inexpensive determination of every civil judicial proceeding.

CPLR 2101. Form of papers. (f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within two days after receipt thereof, he returns the paper to the party serving it with a statement of particular objections.

CPLR 2001. Mistakes, omissions, defects and irregularities. At any stage of an action, the court may permit mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if substantial right of party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.

CPLR 2002. Error in ruling of court. An error in a ruling of the court shall be disregarded if a substantial interest of a party is not prejudiced.

CPLR 2004. Extensions of time generally. Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

CPLR 2005. Excusable delay or default. Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

Rule 201(b) of the Uniform Civil Rules for the Supreme and County Courts: for good cause and in the interest of justice, the Court in an action or proceeding may waive compliance with any of the rules of this Part, other than 202.2 and 202.3, unless prohibited from doing so by statute or by rule of the Chief Justice.

B. April Motion

1. Finding Of Default On The April Motion Was Denial Of Due Process

Appellant was prejudiced by the failure of the IAS court to intervene and make the appropriate order necessary to correct the prejudice created against Appellant by the Office of the Clerk of the Supreme Court which lost Appellant's papers in opposition to Respondents' April Motion. It was this failure by the Clerk's office that caused the alleged default on the April Motion. It was unlawful for the IAS court to fail to order an investigation or to take actions necessary to resolve the disputed facts surrounding the filing of Appellant's papers (R.485-539) in opposition to Respondents' April Motion and to order a traverse hearing to determine the disputed facts surrounding the filing. It was further prejudicial error for the IAS court (1) to fail to recognize the affidavit of the process server (R.843) attesting under oath that Appellant's opposition papers were filed with the court on the designated return date, (2) by not recognizing that the Clerk of the Supreme Court admitted receiving Appellant's opposition papers by accepting for filing Respondents' papers in reply to Appellant's opposition papers, (3) by failing to order as required under law a traverse hearing as to the disputed facts over service of Appellant's opposition papers, (4) by failing to take into account the substantive opposition and the facts, arguments and relief requested in Appellant's opposition papers (R.485-539), affidavits (R.840, R.844), and supplementary affidavits (R.406,

R.412, R.416) as reflected in the statement of the IAS court that:

> "In his supporting affidavit, plaintiff submits no substantive opposition to the underlying motion [April Motion]. This, he reserves, inappropriately, for his reply" (R.18, par. 5))

) and by appearing to perceive in its September 16, 1997 decision (R.17-19) all matters from the unsubstantiated and unproved claims of the Respondents, accepting as undisputed fact the assertions of the Respondents while characterizing the facts contained in Appellant's papers, affidavits and exhibits as 'claimed' or 'alleged'[62],[63].

Simply put, there was no default on the April Motion. What happened was that the office of the Clerk of the Court misplaced Appellant's filing. Respondents attorneys' were aware that the papers had been filed but withheld this evidence from Appellant and the IAS court. (*See* Facts And Procedural History). Appellant is being wrongly penalized for the Clerk of the Court's failure. Under law Appellant was entitled to a traverse hearing on the disputed issue of filing. This should have

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[62] R. 18, at par. 4: "Although plaintiff claims [emphasis added] that the process server submitted the papers to the court on the return date . . . "; at par. 4: "After plaintiff allegedly [emphasis added] served defendant LaFergfola with the summons and complaint . . . "; at par 5 "With respect to the General Electric motion, plaintiff claims [emphasis added] that there was a technical default due to administrative failure in the court . . . ".

[63] The IAS court also erred in its September 16, 1997 decision by describing the instant complaint as commenced in "March 1995" (*See* par. 2 and 6 of the decision R.17-19). The Complaint is dated December 12, 1996 and was filed December 13, 1996.

been ordered by the IAS court at the time Appellant filed his order to show cause. The issue of default on the April Motion is one of disputed fact and an issue on which Appellant submitted documentary evidence that no default had taken place. The pro se Appellant's order to show cause to vacate the default judgment on the April Motion was the wrong form the relief required. The court was wrong not grant the required relief on its own motion. This failure by the court was a denial of due process and fair and equal treatment before the law.

The court's error here is not excusable but Appellant's error in choosing the wrong form by which he requested relief is. Appellant's error is excusable under law the laws cited below (CPLR 103, 104, 2101, and 2001):

> CPLR 103. Form of civil judicial proceedings. (c) Improper form. If a court has obtained jurisdiction over the parties, a civil proceeding shall not be dismissed solely because it is not brought in proper form, but the court shall make whatever order is required for its proper prosecution.
>
> CPLR 104. Construction. The civil practice law and rules shall be liberally construed to secure just, speedy and inexpensive determination of every civil judicial proceeding.
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> CPLR 2101. Form of papers. (f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within two days after receipt thereof, he returns the paper to the party serving it with a statement of particular objections.

> CPLR 2001. Mistakes, omissions, defects and irregularities. At any stage of an action, the court may permit mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if substantial right of party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.

The issue of default on the April motion is one of disputed fact and an issue on which Appellant submitted documentary evidence that no default had taken place. Appellant was entitled under law to said traverse hearing to determine the issues of disputed fact. Respondents do not deny this.

Even under the form mistakenly chosen by Appellant for relief on the issue of alleged default on the April motion, the actions of the court were a denial of due process and fair and equal treatment before the law. There is no law establishing (1) that the court may decide without notice the disputed issues surrounding the alleged default against Appellant and to refuse to recognize as an excuse for an alleged default documentary evidence establishing that no default had occurred, and (2) there is no law establishing that the facts claimed in the Complaint do not state a cause -- or causes -- of action.

2. Obstruction Of Justice By The Clerk Of The Court And Respondents' Attorneys

Appellant's rights were substantially prejudiced by the refusal of the Clerk of the Court to either acknowledge or investigate the loss of Appellant papers by the office of the Clerk of the Court. Such prejudice was a denial of due process and fair or equal treatment before the law and an obstruction of justice. Respondents do not deny this.

Appellant was equally prejudiced by the withholding of material and necessary evidence on the issue of default by Respondents' attorneys who had certain knowledge that the

motion call was answered and Appellant's opposition papers were filed. (*See* Facts And Procedural History).

Argument Point V.
PARTICULARITY, DISCOVERY, AMENDMENT, REVERSAL WITHOUT NOTICE

A. Reversal Without Notice/Grounds For New Action

In McKoan, the IAS court found that Appellant had plead only 2 causes of action: malicious prosecution and emotional distress under tort law. And that Appellant had failed to plead facts to support those causes of action, the IAS court having found that Appellant had plead "conclusory and unsubstantiated allegations" (R.668 - 672, par. 9). The appellate court concurred with that finding by the IAS court and described Appellant as having plead "bare legal conclusions" rather than facts to support his 2 causes of action (R.677). Respondents argued in concurrence with the findings of both courts. In General Electric the IAS court reversed without notice its decision in McKoan - and went counter to the findings of the appellate court and the arguments of the Respondents in McKoan - finding that Appellant did plead facts to support his 2 causes of action in McKoan and that all the facts contained in General Electric were the "same facts" plead in McKoan. The IAS court does not make any mention or list what these "same facts" are in its decision. As such, the court's decision is arbitrary. Moreover, the decision is without any basis in law or fact, obvious error, unfair surprise, and fails to give Appellant adequate notice with which to frame an argument or response. It is obvious from the complaints themselves that the General Electric complaint contains facts not appearing in the McKoan complaint. Appellant argued and argues that these facts are sufficient on their own to support some - if not all - of Appellant's causes of action and that all the facts presented as a whole in the complaint are sufficient to support Appellant's causes of action. (*See* also Argument Point I (A) (2) permitting

this action even if same facts are plead under CPLR 205(a)). Appellant pointed this out to the IAS court in his papers. As an example, Appellant cited for the IAS court the following section which alone supports several of his causes of action (notably those for prima facie tort, invasion of privacy and emotional distress) either alone or in conjunction with all the facts stated in the complaint (R.626 - 628):

> " That defendants' agents dashed in front of and at plaintiff in a threatening manner, confronting plaintiff at extremely close range, stepping and charging into the path of plaintiff and impeding thereby his lawful movement with their persons and their automobiles; suddenly jumping out and charging at plaintiff from cars, buildings and other concealed places; touching the person of plaintiff without his specific consent or request, closely walking behind beside or in front of plaintiff on public streets and places; running after and chasing plaintiff into oncoming traffic, down streets, down flights of steps, onto subway platforms and into oncoming trains.
>
> Defendants' agents blocked, obstructed and interfered with plaintiff's access, entry, movement and egress to streets, buildings and other public places . . . .
>
> Defendants' agents surrounded and chased plaintiff in motor vehicles on public highways in New York State at speeds in excess of 55 miles an hour, following at distances of less than 1 car length and forcing plaintiff's vehicle off the road.
>
> Defendants' agents, servants, and /or employees blocked, obstructed and interfered with plaintiff's access to and egress from cabs and livery service vehicles.

> Defendants' agents, servants, and/or employees took photographs of, and made daily written notes of and made sound recordings of plaintiff's conversations in and outside his homes.
>
> That for the period between December 1993 through February and April 1994 this following and interference with plaintiff's movements and associations was overt and visible to passersby at all times. The aforesaid actions caused passersby to stop and stare at plaintiff and make comments to plaintiff causing embarrassment and torment."

And at page 6 of the Complaint (R.625):

> "Defendants . . . intercepted, accessed and recorded plaintiff's conversations by unlawful wiretapping and the use of mechanical and electronic devices . . . ."

Respondents have never denied that the "facts" stated here do not appear in the McKoan complaint.

Under law cited by the IAS court and the appellate court in their decisions in McKoan, the courts are required by law to read Appellant's Complaint in the light most favorable to Appellant on a motion to dismiss (R.672) and the facts pleaded are assumed to be true and afforded every favorable inference (R.677) (the courts citing, respectively, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976) and Mark Hampton Inc. v. Bergreen, 173 A.D.2d 220, lv denied 80 N.Y.2d 788). The IAS court in General Electric failed to follow law it itself had cited in McKoan and that had been cited by the appellate court in McKoan. Respondents do not deny the applicability of the law cited above and Respondents (1) do not deny the facts stated above, and (2) do not deny that the facts stated above do not appear in the McKoan complaint much less the finding of

the IAS court that these facts are "the same facts" plead in the McKoan complaint.

This finding by the IAS court - that Appellant had indeed plead facts to support his 2 causes of action in McKoan and that these facts are "the same facts" as those in General Electric is grounds to reopen the McKoan case because of judicial error and new evidence contained in the IAS court's ruling in General Electric.

Rather than read the facts, allegations, and claims plead by Appellant in the most favorable light, assume them to be true and afford them every favorable inference as required under law (*See* Rovello and Mark Hampton Inc.; *See* also Argument Point I (A) (2)), the IAS court gave this assumption to Respondents' claims.

B. Denial Of Discovery Contrary To Law

Appellant moved for an order from the courts below in accordance with CPLR 3211 (d) permitting Appellant to depose Respondents LaFergola, McKoan, Cerullo and John M. Liftin (corporate counsel for Respondents Kidder Group and Kidder) and persons present at the meeting between Appellant and LaFergola on April 28, 1995 and such other persons as permitted under the rules of discovery. It was at the April 28, 1995 meeting that LaFergola admitted before witnesses that the statements in the affidavit he signed his name to were false, that the false statements were manufactured by the corporate Respondents and that he was forced to make the statements and sign by the corporate Respondents. Appellant further moved the courts for an order permitting Appellant to subpoena the search warrants alleged to exist by Respondents and the IAS court in McKoan and by the Respondents in General Electric and denied by Appellant in both actions and for such other documents and materials as may be requested and as permitted under the rules of discovery. The IAS granted Respondents' motions to dismiss

without granting relief to Appellant and the appellate court failed to respond to Appellant's request. In doing so the courts acted contrary to the CPLR.

Said discovery and subpoenas would permit Appellant to acquire uncontroverted documentary evidence substantiating several of his claims and allowing Appellant to move for summary judgment on these claims. (See Penato v. George, 52 A.D.2d 939, 941-42, 383 N.Y.S.2d 900, 904-05 (2d Dep't 1976) (3211 (d) discovery needed to clarify documentary evidence); McClary v. Civil Serv. Employees Ass'n, 130 Misc.2d 883, 887-89, 497 N.Y.S.2d 590, 594-95 (Sup. Ct., Steuben 1985) (same). See also CPLR rule 103 (c): a civil proceeding shall not be dismissed solely because it is not brought in proper form, but the Court shall make whatever order is required [emphasis added] for its proper prosecution). Further, the subpoenas would permit Appellant to acquire copies - if not originals - of many of the documents alleged stolen by Respondents allowing him to annex them to an amended complaint and satisfying any arguments that the documents have not been described in sufficient particularity in the original complaint. Discovery would also permit Appellant to bring forth evidence by Corinne Parker, Joel M. Miller, Michael E. Gerber testifying to the fact that Appellant's opposition papers on the April Motion were filed.

Denial of discovery was contrary to the law cited and must be reversed by the Court.

C. Permission To Submit An Amended Complaint

Appellant moved the courts below for permission to amend the General Electric complaint. The IAS granted Respondents' motions to dismiss without granting relief to Appellant. The appellate court failed to address the relief requested by Appellant. Amendment would have permitted Appellant to modify the disputed claim that Appellant has stated

a motive recognized by the courts as barring his prima facie tort claims as well as state with greater particularity items claimed stolen and destroyed by Respondents. Amendment is permitted under CPLR 3025.

Denial of discovery was contrary to the law cited and must be reversed by the Court.

D. Particularity Required On Claims Of Federal And State Constitutional Rights Violations

Appellant raised constitutional claims in the Complaint and in the proceedings before the courts below; however, the courts in every instance failed to make mention or review these claims in their decisions. Claims of federal and state constitutional rights violations require review in particularity. Said denial by the courts below requires review by the Court.

CONCLUSION

The June 3, 1998 Judgment by the trial court is unprecedented and contrary to the law. The 10/22/97 Order of the IAS court is unprecedented and contrary to law. The Complaint states causes of action cognizable at law, and for these and all the foregoing reasons, the Court should grant Appellant's appeal as of right, or in the alternative permission to appeal, permission to expand the Record and such further, other and different relief as the Court may deem just, proper and equitable.

Dated: May 11, 2000

Respectfully submitted,

"s/ John V. Kliebert"
John V. Kliebert

Supreme Court, U.S.
FILED
OCT 2 2000
OFFICE OF THE CLERK

(2)

No. 00-506

In The

Supreme Court of the United States

JOHN V. KLIEBERT,

Petitioner,

- against -

GENERAL ELECTRIC COMPANY, INCORPORATED, KIDDER, PEABODY GROUP, INCORPORATED, KIDDER, PEABODY & COMPANY, INCORPORATED, EDWARD A. CERULLO, RICHARD LAFERGOLA and JOEL "JJ" MCKOAN, and JOHN & JANE DOES 1-25,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20pp

QUESTION PRESENTED

Whether *certiorari* should be granted in connection with the New York courts' award of attorneys' fees against petitioner, under New York law, for pursuing this frivolous litigation when petitioner has failed to show any important federal question or any conflict of authority.

LIST OF PARTIES

The parties to the proceeding below were:

John V. Kliebert, Petitioner;

General Electric Company, Respondent;

Kidder, Peabody Group Inc., Respondent;

Kidder, Peabody & Co. Incorporated, Respondent;

Edward A. Cerullo, Respondent;

Richard LaFergola, Respondent; and

Joel "JJ" McKoan, Respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to rule 29.6 of this Court's Rules of Practice, Respondents state:

1. Respondent General Electric Company is publicly held and is the indirect parent of the successor to Respondent Kidder, Peabody Group Inc. Paine Webber Group Inc. is publicly held and is the parent of Respondent Kidder, Peabody & Co. Incorporated.

2. Respondents' other affiliates are not publicly held.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS[1]

10/24/97	unpublished order ("Final Order") of the New York Supreme Court, New York County dismissing complaint, enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint, awarding Respondents attorneys' fees, and severing the issue of attorneys' fees
12/22/97	unpublished judgment ("Final Judgment") on the 10/24/97 order
06/03/98	unpublished judgment ("Attorneys' Fees Judgment") awarding Respondents $60,000 in attorneys' fees
10/27/98	254 A.D.2d 197, 679 N.Y.S.2d 566 (1st Dep't 1998)
06/03/99	93 N.Y.2d 957, 716 N.E.2d 699, 694 N.Y.S.2d 634 (1999)
09/09/99	93 N.Y.2d 1032, 719 N.E.2d 914, 697 N.Y.S.2d 555 (1999)
01/18/00	268 A.D.2d 306, 700 N.Y.S.2d 821 (1st Dep't 2000)

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[1] This list contains citations to the reports, as well as selected unpublished orders and judgments referenced in this Brief in Opposition to Petition for Certiorari. None of the documents comprising Petitioner's Appendix, including the opinions and orders (Permission for a Writ of Certiorari to the New York Supreme Court (the "Petition") at 1a-36a), are true copies of documents contained in the record on appeal. They appear to be Petitioner's sometimes inaccurate transcription of such documents. Respondents were never served with the entire document annexed at pages 86a-312a of the Petition.

06/29/00 95 N.Y.2d 829, 734 N.E.2d 1210, 712 N.Y.S.2d 909 (2000)

STATEMENT OF THE CASE

Preliminary Statement

This Court lacks jurisdiction over most of the issues raised by the Petition, which relate to a judgment that was *not* appealed to New York's highest court. (See Point I, *infra*). Petitioner has failed to satisfy any of the criteria warranting a grant of the Petition under Rule 10 of this Court's Rules of Practice with respect to his only claim as to which this Court could have jurisdiction, the *amount* of attorneys' fees awarded for frivolous litigation. (See Point II, *infra*).

STATEMENT OF FACTS

A. Background to *Kliebert I* and this Action, *Kliebert II*

In April 1993, Petitioner was dismissed from Kidder's employ (R. 621, ¶ 4; R. 668-69). Kidder Group and General Electric are Kidder affiliates (R. 620-21, ¶¶ 2-4; R. 668). Cerullo, LaFergola and McKoan were Kidder employees (R. 621, ¶¶ 5-7; R. 668).

In late 1993 Petitioner made threatening statements to Respondents, engaged in threatening behavior and possessed weapons (R. 668-69, 678). As a result, the People filed a misdemeanor complaint (*People v. Kliebert*) charging Petitioner with menacing and the Criminal

Court ordered Petitioner to stay away from Kidder employees and to undergo psychiatric treatment (R. 668-69, 677-78).

The Criminal Court dismissed *People v. Kliebert* because it did not plead facts sufficient to support a menacing charge; the dismissal was *not* on the merits (R. 671, 677-78). To the contrary, the Criminal Court stated that the allegations of the complaint in *People v. Kliebert* could have supported an aggravated harassment charge (R. 671).

B. The Dismissal of *Kliebert I*

In *Kliebert I*, Petitioner sought to use the technical dismissal of *People v. Kliebert* as a pretext to claim $111 million in damages against Respondents. Petitioner initially had counsel in *Kliebert I*, who prepared the complaint and amended complaint in that action (R. 603-14), but who withdrew soon thereafter.

The court dismissed *Kliebert I* on motion. (R. 670-72). The court also denied Petitioner's motion to serve a second amended complaint because that pleading "contain[ed] essentially the same causes of action and the same conclusory and unsubstantiated allegations" as the amended complaint (R. 672).

Petitioner appealed the judgment in *Kliebert I* until leave to appeal to the New York Court of Appeals was denied.[2]

Petitioner untimely sought a writ of *certiorari* from this Court. (R. 681).

C. The *Kliebert II* Complaint and Petitioner's Default

Petitioner then commenced this frivolous second case – *Kliebert II* – alleging the same facts as in *Kliebert I*.

Petitioner defaulted on Respondents' motion to dismiss, but Petitioner then moved to vacate the default (R. 838-42, 844-49). The New York Supreme Court denied the motion to vacate on the ground that *Kliebert II* was nothing more than an "attempt[ ] to revive claims clothed in different legal theories, based upon the same facts that underlie [*Kliebert I*]." (R. 17-19).

The Appellate Division affirmed, and the Court of Appeals dismissed Petitioner's motion for leave to appeal.[3]

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[2] *See Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 (1st Dept.), *leave to appeal denied*, 89 N.Y.2d 802, 675 N.E.2d 1232, 653 N.Y.S.2d 279 (1996).

[3] *See Kliebert v. General Electric Co.*, 254 A.D.2d 197, 679 N.Y.S.2d 566 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 957, 716 N.E.2d 699, 694 N.Y.S.2d 634 (1999).

D. Petitioner Does Not Appeal the *Kliebert II* Final Order and Final Judgment

Shortly after the New York Supreme Court denied Petitioner's motions to vacate his default in *Kliebert II* (and after Petitioner appealed from that order to the Appellate Division), the court entered an order (the "Final Order") dismissing the *Kliebert II* complaint, enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint, and awarding Respondents their attorneys' fees. (R. 1258-60). The court also severed the issue of attorneys' fees, and directed a separate hearing (the "Hearing") to determine the amount of attorneys' fees to be awarded. (R. 1260). Petitioner did not appeal from the Final Order or the resulting December 22, 1997 judgment (the "Final Judgment").

E. The *Kliebert II* Attorneys' Fees Hearing and Appeal

At the Hearing held on June 1 and 2, 1998 (R. 82-405), the same counsel who represented Petitioner in connection with *Kliebert I* zealously represented Petitioner and successfully opposed introduction of certain evidence. (R. 183, 222). Counsel also cross-examined Respondents' witness and called his own witness.

At the close of the Hearing, the court awarded Respondents $60,000, approximately $17,000 less than requested. (R. 404). This award was reduced to a judgment (the "Attorneys' Fees Judgment") from which Petitioner appealed. (R. 3-8).

On appeal from the Attorneys' Fee Judgment, in addition to challenging the amount of the award, Petitioner sought to challenge the then no longer appealable Final Order and Final Judgment, including the dismissal of the complaint, the fact of the attorneys' fees award and the injunction enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint.

The Appellate Division (1) affirmed the amount of fees awarded, finding that the "value of [Respondents'] attorneys' services, which [Petitioner] was directed to pay as a sanction for frivolous conduct, were reasonably assessed at $60,000," (2) dismissed Appellant's second attempt to appeal the merits of the dismissal of *Kliebert II*, and (3) held that Petitioner's other claims, including his attempt to appeal from the injunction and the fact of the attorneys' fees award, were "without merit."[4] The Court of Appeals denied Petitioner's motion for leave to appeal and to expand the record on appeal.[5]

Petitioner now seeks a writ of *certiorari*.

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[4] *Kliebert v. General Electric Co.*, 268 A.D.2d 306, 700 N.Y.S.2d 821 (1st Dep't 2000).

[5] *Kliebert v. General Electric Co.*, 95 N.Y.2d 829, 734 N.E.2d 1210, 712 N.Y.S.2d 909 (2000).

REASONS FOR DENYING THE PETITION

I.

THIS COURT DOES NOT HAVE JURISDICTION OVER AN APPEAL FROM THE FINAL ORDER AND FINAL JUDGMENT

This Court has no jurisdiction to grant *certiorari* with respect to the Final Order and Final Judgment, dismissing *Kliebert II*, enjoining further related litigation and awarding attorneys' fees, because Petitioner failed to appeal from that order and judgment, and thus failed to obtain a decision of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257.

Petitioner's appeal from the Attorneys' Fees Judgment does not bring up for review earlier final orders or judgments. N.Y. Civ. Prac. L. & R. 5501(a); *Crystal v. Manes*, 130 A.D.2d 979, 516 N.Y.S.2d 823 (4th Dep't 1987).

The Final Order and Final Judgment were final orders under N.Y. Civ. Prac. L. & R. 5501(a) because the Final Order severed the issue of the amount of attorneys' fees to be awarded, the only issue that remained to be resolved after that order. *In re Liquidation of Union Indemnity Ins. Co.*, 224 A.D.2d 319, 638 N.Y.S.2d 52 (1st Dep't 1996) (severance "create[s] finality and promote[s] judicial economy . . . by generating a final judgment and thus a jurisdictional basis for review by the Court of Appeals"). The same would have been true under federal law. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) ("a decision on the merits is a 'final decision' for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case").

Petitioner's June 29, 1998 notice of appeal (which would have been untimely as to the Final Order and Final Judgment in any event) appealed only from the Attorneys' Fees Judgment (R. 3). N.Y. Civ. Prac. L. & R. 5513(a). Yet, Petitioner attempts to raise here each of the issues resolved by the Final Order and Final Judgment. (*See* Petition at 34, 149a-160a, 241a-312a (arguing merits of *Kliebert II* complaint; Petition at 33, 241a (arguing propriety of injunction); Petition at 9-12, 114a-116a (arguing propriety of award of attorneys' fees)).

Because Petitioner did not appeal from the Final Order and Final Judgment, there was never a judgment of the "highest court of [New York] in which a decision could be had" as to the issues resolved by that order and judgment (i.e., dismissal of *Kliebert II*, the award of attorneys' fees, and the injunction from suit), and Petitioner may not obtain review of those issues in this Court. Accordingly, the only issue raised by the Petition over which this Court may have jurisdiction is the constitutionality of the Attorneys' Fees Judgment awarding $60,000 in fees.

II.

PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASONS

This Court will grant a petition for writ of *certiorari* "only for compelling reasons." Sup. Ct. R. 10. In connection with a state court decision, Rule 10(b) and (c)

describe the "character of the reasons the Court considers," as follows:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner has not identified any important federal question or any conflict of authority. Instead, although not entirely clear, he appears to attack, without citation to a single supporting judicial precedent, the constitutionality of the Attorneys' Fees Judgment on three grounds: (1) the retroactive application of the 1998 amendment to 22 N.Y.C.R.R. § 130-1 to the Attorneys' Fees Judgment violates the Constitution (Petition at 9-13); (2) the evidence did not support the amount of the award (Petition at 18-32); and (3) the Attorneys' Fees Judgment was supported by misrepresentations at the Hearing (Petition at 13-18, 27-28).

A. The State Courts' Application of the 1998 Amendment to 22 N.Y.C.R.R. § 130-1 Does Not Raise a Federal Question

Section 130-1.1(a) of the New York Code Rules and Regulations provides in relevant part:

> The Court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and *reasonable attorney's fees, resulting from frivolous conduct* as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. [emphasis added.]

Petitioner's primary argument is that the 1998 amendment to 22 N.Y.C.R.R. § 130-1, which eliminated the $10,000 maximum amount of a legal fees award, does not apply because Respondents' entitlement to attorneys' fees under § 130-1 – as opposed to the determination of the amount – was part of the court's October 24, 1997 Final Order. Thus, according to Petitioner, the 1998 amendment should not apply to the amount of the award, limiting the award to $10,000. (Petition at 9-13). Whether the 1998 amendment to 22 N.Y.C.R.R. § 130-1 applies to the Attorneys' Fees Judgment is entirely a matter of New York law. Moreover, Petitioner has not preserved this argument.

The interpretation of a state statute as well as a determination of its retroactivity is governed by state law. *See Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 361-64 (1932) (Cardozo, J.). In *Great Northern Ry.*, discussing a state court's retroactivity determination as to its common law rules, Justice Cardozo, speaking for a unanimous Court, held:

> We think the Federal Constitution has no voice on the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.

Great Northern Ry. Co., 287 U.S. at 364. There is no reason the federal Constitution has any greater interest in a state's determination of the retroactivity of state statutes or rules than of its common law. Accordingly, Petitioner's argument as to the retroactivity of the 1998 amendment does not raise any federal question, let alone an important one.

Indeed, the rule was not applied retroactively. The 1998 amendment to § 130-1 went into effect on March 1, 1998. *See* New York State Register, Vol. 20, Issue 4 (January 28, 1998). The Hearing was held three months *later* on June 1 and 2, 1998, and judgment was entered on June 3, 1998. Thus, it was proper for the court to apply the rule in effect at the time of the Hearing and judgment to the amount of this award. *Bank of Smithtown v. Boglino*, 759 A.D.2d 574, 686 N.Y.S.2d 499 (2d Dep't 1999) (applying amended § 130-1 to pre-1998 conduct); *Greene v. Merchants & Businessmen's Mutual Ins. Co.*, 259 A.D.2d 519, 686 N.Y.S.2d 454 (2d Dep't 1999) (recognizing that amended § 130-1 – with greater than $10,000 limit – would apply to attorneys' fees award entered on January 28, 1998). The same rule would apply under federal law. *Landgraf v. USI Film Products*, 511 U.S. 244, 276-278 (1994) (recognizing that a new provision providing for attorneys' fees would apply to conduct that predated the new

fees provision) (citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974)).

In addition, Petitioner has failed to preserve this issue for review by this Court. This Court cannot review issues that a litigant was procedurally barred from raising in the state courts. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-98 (1990) (refusing to consider constitutional issues procedurally barred under state law).

Petitioner's counsel did not object to the court's application of the 1998 amendment at the Hearing nor at any time prior to the entry of the Attorneys' Fees Judgment. Under New York law, Petitioner is barred from raising this ground on appeal. *See, e.g., In re Transit Casualty Co.*, 223 A.D.2d 488, 636 N.Y.S.2d 791 (1st Dep't 1996) (recognizing that it is improper to raise arguments not raised to the court below); *Rosenberg v. Haddad*, 208 A.D.2d 468, 617 N.Y.S.2d 330 (1st Dep't 1994) (precluding litigant from raising argument for first time on appeal); *Telemark Construction, Inc. v. Greenberg*, 205 A.D.2d 438, 613 N.Y.S.2d 900 (1st Dep't 1994) (recognizing that failure to raise issue at trial constitutes waiver on appeal).

B. Petitioner's Challenge to the the Evidence Supporting the Attorneys' Fees Judgment Does Not Raise a Federal Question

Due process requires a fair hearing before an unbiased tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Petitioner does not challenge the procedures employed nor the impartiality of the judge. In light of the thorough hearing held and the evidence in the record supporting

the court's award, the Hearing more than satisfied due process.

Rule 10 provides that a writ "is rarely granted when the asserted error consists of erroneous factual findings." Petitioner raises no more of an argument. Petitioner claims that the evidence did not support the award, and, without any finding by any court, that the Attorneys' Fees Judgment was supported by false testimony. These are challenges to the weight of the evidence and the credibility of the witnesses, which the New York courts decided against Petitioner.

CONCLUSION

To the limited extent this Court has jurisdiction, Petitioner has failed to identify an important federal question or a conflict of authority, and the Petition should be denied.

Dated: November 2, 2000

Respectfully submitted,

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